Petition

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No. .....

In the Supreme Court of the United States

OCTOBER TERM, 1981

CITIES SERVICE GAS COMPANY, a corporation; COLORADO INTERSTATE GAS COMPANY, a corporation; EL PASO NATURAL GAS CO., a corporation; KANSAS-NEBRASKA NATURAL GAS COMPANY, INC., a corporation; MICHIGAN WISCONSIN PIPE LINE COMPANY, a corporation; NATURAL GAS PIPELINE COMPANY OF AMERICA, a corporation; NORTHERN NATURAL GAS COMPANY, a corporation, a division of InterNorth, Inc., a corporation; PANHANDLE EASTERN PIPE LINE COMPANY, a corporation; and TRANSWESTERN PIPELINE COMPANY, a corporation, *Petitioners,*

VERSUS

OKLAHOMA TAX COMMISSION and LEO WINTERS, STATE TREASURER OF OKLAHOMA, *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Is 28 U.S.C. 1341 (the Tax Injunction Act) applicable to prevent these nine interstate gas pipeline companies (Petitioners herein) from seeking relief in Federal Court when, in a case in which none of them were parties, the Oklahoma Supreme Court had already held that the Conservation Excise Tax in question is constitutional and valid?

2. Do these nine interstate gas pipeline companies have a "plain, speedy and efficient remedy in the State courts" when the Oklahoma Supreme Court had already ruled, prior to the filing of their Federal Court lawsuit, that the Conservation Excise Tax was constitutional and valid in a case in which none of the Petitioners were parties?

3. Are the Oklahoma Gas Conservation Excise Tax and the Tax Credit Act, taken together, in violation of the Constitution of the United States and the Natural Gas Act (15 U.S.C. 717, *et seq.*), in view of the fact that both of them were passed as a part of a tax package purposely and publicly designed and planned to place the greater part of the tax burden on interstate gas and lighten the burden on intrastate gas, resulting in 88% of the tax being paid by interstate gas and only 12% by intrastate gas, especially when viewed in comparison with the case of *State of Maryland, et al.* v. *State of Louisiana, et al.*, No. 83 Original, decided May 21, 1981, and reported at 49 U.S. Law Week 4562, ... U.S ....., 101 S.Ct. 2114, 68 L.Ed.2d 576?

THE PARTIES

All of the parties are as listed in the caption hereof.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Petitioners above named respectfully pray that a Writ of Certiorari issue to review a judgment of the United States Court of Appeals for the Tenth Circuit entered August 5, 1981.

CITATION OF OPINIONS BELOW

Memorandum Opinion and Order, not officially reported, entered by the trial court April 28, 1980, dismissing the case on the ground that it lacked subject-matter jurisdiction because of 28 U.S.C. 1341. A copy of the Memorandum Opinion and Order appears at pages 1a-6a of the Appendix hereto.

Opinion of the U. S. Court of Appeals for the Tenth Circuit dated August 5, 1981, now reported at 656 Fed.2d 584, affirming the trial court. A copy appears at pages 7a-13a of the Appendix hereto.

Order of the U. S. Court of Appeals for the Tenth Circuit entered August 31, 1981, denying the Appellants' (Petitioners' herein) Petition for Rehearing and Suggestion for Rehearing En Banc. A copy appears at pages 14a-15a of the Appendix hereto.

Order of the U. S. Court of Appeals for the Tenth Circuit dated September 22, 1981, staying the mandate thirty (30) days to October 22, 1981. A copy appears at pages 16a-17a of the Appendix hereto.

STATEMENT OF JURISDICTION

The judgment of the U. S. Court of Appeals for the Tenth Circuit was entered August 5, 1981. A timely filed Petition for Rehearing and Suggestion for Rehearing En Banc was denied August 31, 1981. This Petition for a Writ of Certiorari is being filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 8, Clause 3, of the United States Constitution, which provides, in pertinent part, that:

> "The Congress shall have Power to regulate Commerce with foreign nations, and among the several States, and with the Indian Tribes."

Article VI, Clause 2, of the Constitution of the United States which provides, in pertinent part, that:

> "This Constitution, and the Laws of the United States which shall be made in pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the Contrary notwithstanding . . ."

15 U.S.C. 717(a) and (b), which provide, in pertinent part,:

> "(a) . . . it is declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest.
>
> "(b) The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural gas companies engaged in such transportation or sale . . ."

15 U.S.C. 717u, which provides, in pertinent part, that:

"The District Courts of the United States . . . shall have exclusive jurisdiction of violations of this chapter or the rules, regulations, and orders thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by, or to enjoin any violation of, this chapter or any rule, regulation or order thereunder . . ."

28 U.S.C. 1331, which provides that:

"The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws or treaties of the United States."

28 U.S.C. 1337(a), which says, in pertinent part, that:

"The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce . . .".

28 U.S.C. 1341, which provides that:

"The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of tax under any State law where a plain, speedy and efficient remedy may be had in the courts of such State."

STATEMENT OF THE CASE

The Petitioners are purchasers of natural gas within the State of Oklahoma for transportation or sale for resale in interstate commerce and are subject to regulation by the Federal Energy Regulatory Commission (FERC) (formerly Federal Power Commission), 15 U.S.C. 717, *et. seq.*

The 1977 Oklahoma Legislature passed, as part of a tax package, the Gas Conservation Excise Tax on all natural gas and/or casinghead gas produced and saved in Oklahoma, House Bill 1441, 68 O.S. 1107-1111, together with the Tax Credit Act, which allowed producers and royalty owners (mostly Oklahomans) a credit on their Oklahoma Income Tax equal to the amount of Gas Conservation Excise Tax they paid. It even included a cash payment in the amount of such Tax, where no income tax was due, House Bill 1439, 68 O.S. 2357D. Hence, the two Acts, taken together, in their application, impose a tax on the purchase of gas, rather than upon production as proclaimed in the Gas Conservation Excise Tax Act.

The net effect of the excise tax was that it applied only to gas sold for less than $1.00 per mcf. The most of the gas sold in Oklahoma for less than $1.00 per mcf was gas to be shipped in interstate commerce. Intrastate gas, for the most part, sold for more than $1.00 per mcf. Thus, by publicly announced plan and design, the most of the tax fell on interstate gas (88% and only 12% on intrastate gas). The undisputed evidence showed the estimated amount of tax to be paid by all interstate gas purchasers up to December 31, 1984, the last assured date of the effect of the Natural Gas Policy Act, to be $91.2 million as against an estimated total of $12.1 million for intrastate purchasers.

Except for a small number of isolated contracts of certain date and lacking certain reimbursement provisions, the Oklahoma producer or royalty owner pays none of the tax because he is either reimbursed by the purchaser, or if not and he pays the tax himself, he gets it back as a credit on his Oklahoma Income Tax, or in cash from the State.

Before the Petitioners filed their Complaint in the U. S. District Court for the Western District of Oklahoma, the Oklahoma Supreme Court, in a case in which none of the Petitioners herein were parties, assumed jurisdiction in two original actions, consolidated since the same levied tax was involved, and declared by the court to be of general public importance, held that the two Acts were constitutional and valid. *Post Oak Oil Co.* v. *Oklahoma Tax Commission* and *Forrest Rozzell* v. *Oklahoma Tax Commission*, consolidated, 575 P.2d 964 (Okl., 1978).

Thus, the Petitioners here knew that if they endeavored to avail themselves of the State remedies, either administratively through the Oklahoma Tax Commission or by legal action through the district courts, the Tax Commission would promptly file its Demurrer or Motion to Dismiss on the ground that the question had already been settled by the Oklahoma Supreme Court in the *Post Oak* case. They also knew that the Tax Commission or any district court, being bound by the Oklahoma Supreme Court opinion, would sustain any such Demurrer or Motion to Dismiss. They were therefore convinced that in light of the *Post Oak* case they had no "plain, speedy and efficient remedy in the State courts", so they brought an action in the U. S. District Court for the Western District of Okla-

homa, seeking a declaratory judgment that said Acts, taken together, were unconstitutional, seeking to enjoin the enforcement of said Acts and the collection of the tax by the Oklahoma Tax Commission and further seeking a refund of the amount of taxes paid under protest by them. A full-scale evidentiary hearing was held (there had been no evidence taken or record made in the original action in the Oklahoma Supreme Court in the *Post Oak* case), following which the trial court dismissed the Complaint on the stated ground of lack of subject-matter jurisdiction because of 28 U.S.C. 1341. A copy of said Order appears at pages 1a-6a of the Appendix hereto. It holds that, notwithstanding the Oklahoma Supreme Court decision in the *Post Oak Oil Co.* case, the Plaintiffs had a "plain, speedy and efficient remedy in the State courts." It made no Findings of Fact and Conclusions of Law.

The Plaintiffs filed their Motion to Alter or Amend, or in the Alternative, to Reconsider or Vacate, and the lower court overruled it. An appeal was then taken to the United States Court of Appeals for the Tenth Circuit.

The Court of Appeals affirmed the trial court in its Opinion entered August 5, 1981, now reported at 656 F.2d 584. A copy of that Opinion appears at pages 7a-13a of the Appendix hereto. It then overruled the Plaintiffs'/Appellants' Petition for Rehearing and Suggestion for a Rehearing En Banc on August 31, 1981. A copy of that Order appears at page 14a of the Appendix hereto. That prompted this Petition for a Writ of Certiorari.

The basis for federal jurisdiction in the court of first instance was 28 U.S.C. 1331(a), 1337 and 2201 and 15 U.S.C. 717, *et seq.*

REASONS FOR GRANTING THE WRIT

1. The Opinion of the lower court and of the Court of Appeals are in direct conflict with numerous opinions of this Court.

A. The issues in this case, and the facts as well, particularly the provisions of the statutes at issue here favoring in-state interests over those interests outside of the state, are closely analogous to the issues and facts in the case of *State of Maryland, et al.* v. *State of Louisiana, et al.*, No. 83 Original, decided May 21, 1981, and reported at 49 U. S. Law Week 4562, ... U.S. ....., 101 S.Ct. 2114, 68 L.Ed.2d 576, most specifically in the taxing scheme devised by both State Legislatures creating tax credits and exclusions which, in effect, favor local interests and discriminate against interstate commerce. The Court of Appeals committed gross error in not following that decision and in brushing it aside in one paragraph. The Supreme Court Opinion is scholarly and sound and is particularly applicable to this case because the taxing scheme as created by the statutes of the State of Louisiana is quite similar to that of the State of Oklahoma, here under consideration. Among that Opinion's quotes are the following, found at pages 4570-71 of 49 U.S. Law Week:

> "In each case it is our duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce. (Citing cases.)
>
> * * * *
>
> "In this case the Lousiana First Use Tax unquestionably discriminates against interstate commerce in favor of local interests as the necessary result of

various tax credits and exclusions. No further hearings are necessary to sustain this conclusion . . .".

B. There is no "plain, speedy and efficient remedy in the State courts" of Oklahoma for the reason that the *Post Oak* decision in Oklahoma eliminates an effective remedy in the State courts. This Court has held many times that a litigant does not have a "plain, speedy and efficient remedy in the State courts" if the state remedies are *uncertain, Township of Hillsborough* v. *Doris Duke Cromwell,* 326 U.S. 620, 66 S.Ct. 445, 90 L.Ed. 358 (1946); if they are *doubtful or speculative, Davis* v. *Wakelee,* 156 U.S. 680, 15 S.Ct. 155, 39 L.Ed. 578 (1895); if they are *problematical, Mountain States Power Company* v. *Public Service Commission of Montana,* 299 U.S. 167, 57 S.Ct. 168, 81 L.Ed. 99 (1936); if there is *serious uncertainty* as to the state remedies, *Corporation Commission of the State of Oklahoma* v. *Logan W. Carey, Trustee,* 296 U.S. 452, 56 S.Ct. 300, 80 L.Ed. 324 (1935); *State of Maryland, et al.* v. *State of Louisiana, et al.,* 49 U.S. Law Week 4562, ...U.S. ....., 101 S.Ct. 2114, 68 L.Ed.2d 576, *supra.* (See footnotes 15 and 16 at page 4566 of 49 U.S. Law Week.)

C. This Court has held that:

> ". . . assuming, arguendo, that litigants are entitled to a Federal forum for the resolution of all Federal issues, that entitlement is most appropriately asserted by a state litigant when he seeks to *relitigate a Federal issue adversely determined in completed state court proceedings.*" (Emphases are those of this Court.)

Huffman, etc., et al. v. *Pursue, Ltd.,* 420 U.S. 592, 95 S.Ct. 1200, 43 L.Ed.2d 482 (1975), *rehearing denied* 421 U.S. 971, 95 S.Ct. 1969, 44 L.Ed.2d 463 (1975).

2. Millions of consumers in many states will be adversely affected if this Court does not grant the Writ.

3. Some $113 million in illegal taxes will be paid to the State of Oklahoma up to December 31, 1984 by interstate purchasers of gas if the Writ is not granted by this Court.

4. The lower court and the Court of Appeals erred in completely disregarding the grave constitutional issues involved. Since numerous opinions of this Court on which we rely to support two or more of our sub-divisions under sub-paragraph A of this paragraph 4, support two or more of said sub-divisions, and overlap, in order to avoid repetition and for the sake of brevity, we use the same citations to cover all of them.

In disregarding the constitutional issues, both the trial court and the Court of Appeals erred, because:

A. The two Acts, taken together,

1. Constitute a burden on interstate commerce;

2. Interfere with the regulatory scheme of the FERC;

3. Violate the essential purpose of the Natural Gas Act (15 U.S.C. 717, *et seq.*);

4. Violate the Commerce Clause of the Constitution of the United States;

5. Violate the Supremacy Clause of the Constitution of the United States;

6. Discriminate against interstate commerce.

> "No state may impose a tax, however labeled, or formulated, which discriminates against interstate commerce. Discrimination may arise from the practical operation of a law non-discriminatory on its face, but discriminatory in its application or operation."

Boston Stock Exchange, et al. v. *State Tax Commission, et al.*, 429 U.S. 318, 97 S.Ct. 599, 50 L.Ed.2d 514 (1977); *Halliburton Oil Well Cementing Co.* v. *Reilly*, 373 U.S. 64, 83 S.Ct. 1201, 10 L.Ed.2d 202 (1963), *rehearing denied* 374 U.S. 858, 83 S.Ct. 1861, 10 L.Ed.2d 1082 (1963); *Nippert* v. *City of Richmond*, 327 U.S. 416, 66 S.Ct. 586, 90 L.Ed. 760 (1946); *Arizona Public Service Co.* v. *Snead*, 441 U.S. 141, 99 S.Ct. 1629, 60 L.Ed.2d 106 (1979).

Helson v. *Commonwealth of Kentucky*, 279 U.S. 245, 49 S.Ct. 279, 73 L.Ed. 683 (1929) says:

> "Any state law burdening interstate commerce, by taxation or otherwise, constitutes a regulation beyond the power of the State under the Federal Constitution."

See also *Federal Power Commission* v. *Corporation Commission of the State of Oklahoma, et al.*, 362 F.Supp. 522 (D.C., W.D. Okla. 1973), *affirmed* 415 U.S. 961, 94 S.Ct. 1548, 39 L.Ed.2d 863 (1974), citing with approval *Pennsylvania* v. *West Virginia*, 262 U.S. 553, 43 S.Ct. 658, 67 L.Ed. 1117 (1923).

Oklahoma v. *Kansas Natural Gas Co.*, 221 U.S. 229, 31 S.Ct. 564, 55 L.Ed. 716 1911). *Northern Natural Gas Co.* v. *State Corporation Commission of the State of Kansas*, 372 U.S. 84, 83 S.Ct. 646, 9 L.Ed.2d 601 (1963), quoting with approval from *Natural Gas Pipeline Co.* v. *Panoma Corp.*, 349 U.S. 44, 75 S.Ct. 576, 99 L.Ed. 866 (1955), where state law *even indirectly* affects regulation by FERC. *Boston Stock Exchange, et al.* v. *State Tax Commission, et al.*, 429 U.S. 318, 97 S.Ct. 599, 50 L.Ed.2d 514 (1977), *supra. Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672, 74 S.Ct. 794, 98 L.Ed. 1035 (1954).

B. The Federal court is not bound by the opinion of the Oklahoma Supreme Court in the *Post Oak Oil Co.* case. *The United States, ex rel. Thomas Butz* v. *The Mayor and Aldermen of the City of Muscateen, S.C.*, 8 Wall 575, 75 U.S. 575, 19 L.Ed. 490 (1869).

C. The Federal court has *exclusive jurisdiction* under the Natural Gas Act, 15 U.S.C. 717u.

5. The Court of Appeals in its Opinion erroneously placed great and controlling emphasis on the case of *Rosewell* v. *LaSalle National Bank, Trustee*, 49 U.S. Law Week 4285, ____ U.S. ____, 101 S.Ct. 1221, 67 L.Ed.2d 464. That case is not applicable here and is distinguishable from this case in at least the following 15 respects:

A. The Illinois statute required the taxpayer to pay the tax under protest and then pursue whatever remedies she might have. In that case the Plaintiff refused to do

so. We paid our tax timely each month and complied meticulously with the statute.

B. The taxpayer started to avail herself of the Illinois remedy by appealing unsuccessfully for a correction of her 1977 tax assessment before the Cook County Board of Appeals. Then she abandoned that and went to Federal Court. Here, because of the *Post Oak* decision, we came to Federal Court in the first place, but paying our taxes under protest each month in the meantime.

C. She did not allege any procedural defect in the State (Illinois) remedy, other than delay (page 4289 and headnote (a) at page 4286 of 49 U.S. Law Week. Here we claim that the *Post Oak* decision foreclosed any and all of our State remedies, procedural or otherwise.

D. She relied heavily on the failure of the State to pay interest on her refund (page 4289 of 49 U.S. Law Week), in that it took two years or longer to get a refund. Here we did not pitch our Complaint on any such flimsy grounds. On the contrary, we have relied on solid constitutional grounds, supported by undisputed evidence and numerous and excellent Supreme Court opinions.

E. That was a Civil Rights case, brought under 42 U.S.C. 1983 and 28 U.S.C. 1343 (page 4287 of 49 U.S. Law Week).

F. In that case the Illinois Supreme Court had not already ruled adversely to the taxpayer's claim. Here, the Oklahoma Supreme Court, in the *Post Oak* case, had already held squarely against our position.

G. That opinion quotes from Senator Bone, author of the Tax Injunction Act (28 U.S.C. 1341), indicating

that the statute assured a "full hearing and judicial determination of the controversy (81 Cong.Rec. 1416 (1937))." Here, in actuality, we do not have that, so the so-called remedy would be merely an empty ritual or an illusive "paper remedy" without relief from the Federal Court.

H. The Opinion, at page 4289 of 49 U.S. Law Week, points out that she made no argument that the Illinois refund procedure is uncertain or otherwise unclear. *We did.*

I. At page 4289 of 49 U.S. Law Week, the Opinion quoted that: ". . . because the Illinois remedy imposes no unusual hardship on respondent requiring *ineffectual activity or an unnecessary expenditure of time or energy,* we cannot say that it is not 'efficient'." In this case, to have to start all over, after more than three and a half years and continue to pay the heavy tax each month would certainly require ineffectual activity and unnecessary expenditure of time and energy.

J. At page 4290 of 49 U.S. Law Week, this Court remarks that: ". . . Respondent may present these new facts in her pending suit in Federal District Court to enjoin collection of her 1978 Property Tax" (Footnote 22). This would indicate that the Court would entertain such an action, exactly what we are urging here, if she complied with the statute.

K. At page 4292 of 49 U.S. Law Week, in the final sentence of the Opinion the Court said that: ". . . refund without interest in two years is a plain, speedy and efficient remedy under the Tax Injunction Act." As noted elsewhere, the lack of interest, or the low statutory rate

of interest, is not our point of contention. We emphasize the unconstitutionality of the Act and that the *Post Oak* case denies us a "plain, speedy and efficient remedy" in the State courts.

L. Although it is not mentioned in the Opinion, we do learn from *28 East Jackson Enterprises, Inc.* v. *Cullerton, et al.*, 523 F.2d 439 (7th Cir., 1976), that *injunctive relief is one of the remedies provided by the Illinois statutes.* Here we do not have such a luxury in the State remedies. In the *28 East Jackson Enterprises, Inc.* case, the taxpayer brought suit in the Federal Court seeking injunctive relief from the enforcement of an Illinois Real Estate Tax and from the sale of his property for failure to pay the taxes on the flimsy grounds that *he had no funds for the payment of said taxes and could not borrow sufficient funds to pay the full tax.* That action, too, was brought under the Civil Rights Acts, 28 U.S.C. 1343 and 42 U.S.C. 1983. The trial court granted an injunction, but on appeal the Seventh Circuit reversed on the specific ground that the Illinois statute granted two separate, adequate remedies: (1) to pay under protest and sue to recover; and (2) *to obtain a State injunction* if it did not have the funds with which to pay the tax, even under protest. See Syllabi Numbers 6, 7, 8, 9 and 10. (Emphasis supplied.)

M. The *Rosewell* case cites and relies on *Tully* v. *Griffin*, 429 U.S. 68, 97 S.Ct. 219, 50 L.Ed.2d 227 (1976). That case has no application here. There, a Vermont furniture manufacturer located only six miles from the Vermont-New York state line, did a substantial business of selling furniture across the line in New York. New

York determined that it was entitled to collect New York State and local taxes on the Plaintiff's sales in New York. The Plaintiff brought an action for a 3-Judge Court, seeking to enjoin the collection by New York of these taxes and its further effort to audit the Plaintiff's books. The lower court held for the Plaintiff, but on direct appeal, this Court correctly held that since *the State law provided the taxpayer the right to a preliminary injunction against the collection of the taxes while it was litigating the question,* the Plaintiff had an adequate remedy in the State courts. We do not have the luxury of any such remedy in Oklahoma. Furthermore, in that case there had been no ruling by the State Supreme Court upholding the validity of the State's position. Here we have a ruling by the highest court of this State in the *Post Oak* case that the statute is constitutional and valid and that we must pay the tax. In headnote No. 2, even in that case, this Court said:

> "A Federal District Court is under an equitable duty to refrain from interfering with a state's collection of its revenues *except in cases where an asserted federal right might otherwise be lost.*" (Emphasis supplied.)

In our case, we show numerous Federal rights which will be lost if the State is not enjoined from collecting the tax.

N. Please note the following excellent quote in the Dissenting Opinion, near the top of page 4295 of 49 U.S. Law Week:

> ". . . This form-over-substance interpretation renders the exception contained in the Act mean-

ingless, because there would be little purpose in denying a Federal remedy to a litigant and sending him to state court to pursue a state remedy — albeit a quick and certain one — that provided no relief. *A futile state remedy is not significantly different from no remedy at all.* Similarly, an inadequate state remedy is not analytically different from a state procedure that provides a remedy as to only a portion of the litigant's claims. *Such an incomplete remedy will not defeat Federal jurisdiction . . .*" (Emphasis supplied.)

O. The *Rosewell* case was a 5-4 opinion. The fifth concurring opinion was by Justice Blackmun and he emphasized his great reluctance and his severe misgivings. There is great and persuasive argument in the Dissenting Opinion of the four dissenting Justices.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX

[Filed April 28, 1980]

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

CITIES SERVICE GAS COMPANY, a corporation; COLORADO INTERSTATE GAS COMPANY, a corporation; EL PASO NATURAL GAS CO., a corporation; KANSAS-NEBRASKA NATURAL GAS COMPANY, INC., a corporation; MICHIGAN WISCONSIN PIPE LINE COMPANY, a corporation; NATURAL GAS PIPELINE COMPANY OF AMERICA, a corporation; NORTHERN NATURAL GAS COMPANY, a corporation; PANHANDLE EASTERN PIPE LINE COMPANY, a corporation; and TRANSWESTERN PIPELINE COMPANY, a corporation, Plaintiffs,	)	No. CIV-78-0328-E
vs.	)	
OKLAHOMA TAX COMMISSION and LEO WINTERS, STATE TREASURER OF OKLAHOMA, Defendants.	)	

Lee B. Thompson, 2120 First National Center, Oklahoma City, OK 73102, for Plaintiffs.

William J. Sears and Jenifer L. Ewbank of Cities Service Gas Company, P. O. Box 25128, Oklahoma City, OK 73125, for Plaintiff Cities Service Gas Company.

William J. Legg, 1600 Midland Center, Oklahoma City, OK 73102, and Stephen K. Yasinow, One Woodward Ave., Detroit, Michigan 48226, for Plaintiff Michigan Wisconsin Pipe Line Company.

Marjorie Patmon, General Counsel, Oklahoma Tax Commission, 2501 Lincoln Boulevard, Oklahoma City, OK 73194, for Defendants.

MEMORANDUM OPINION AND ORDER

Before LUTHER B. EUBANKS,
United States District Judge.

By complaint filed herein, plaintiffs seek a declaratory judgment from this court that the Oklahoma Conservation Excise Tax Act, 68 O.S. §§ 1107, et seq., considered together with a tax credit allowed pursuant to 68 O.S. § 2357D, is unconstitutional, and further seek to enjoin the collection of the taxes levied under said statute. Additionally, plaintiffs seek the recovery, or refund, of conservation excise taxes paid by these plaintiffs to the Oklahoma Tax Commission under protest, in accordance with the procedure prescribed at 68 O.S. § 226.

By an amendment to their complaint, plaintiffs sought a Temporary Restraining Order which would have prohibited the Oklahoma State Treasurer from accepting and depositing into a State fund available for legislative appropriation the conservation excise taxes paid under protest by these plaintiffs.

This amendment to plaintiffs' complaint was occasioned by a legislative amendment to 68 O.S. § 226(b) removing the provision of the refund procedure which segregated funds paid under protest pending disposition of the taxpayers' claim for refund of taxes allegedly erroneously collected. The new procedure provides that refunds of taxes paid under protest where the taxpayer ultimately prevails will be paid from the current collections of the Tax Commission. In the event there are no current collections, the amendment provides that refunds will be paid from monies appropriated by the State legislature to a special refund

reserve account. In addition to seeking a Temporary Restraining Order, plaintiffs asked that this amended procedure be declared unconstitutional.

After hearing, the application for Temporary Restraining Order was denied by this court. The motion of the plaintiffs for a new hearing or for reconsideration of the denial as well as the defendant Oklahoma Tax Commission's motion to abstain and dismiss were overruled by order of July 26, 1978, which provided, in pertinent part:

> The court fully realizes that this matter must be heard at lease one more time, and perhaps two times, and if, upon closer scrutiny, the court, concludes that the Act is unconstitutional and that there is no plain, speedy and efficient remedy afforded to the plaintiffs by said statute, then and in such event a preliminary injunction may issue. Unless the court orders otherwise, or unless the parties should stipulate to the contrary, a hearing must be held further on whether an injunction permanent in nature should issue herein. This is so because there has been no order or stipulation advancing the hearing on the merits so that the two hearings may be consolidated. Also, the court can hear arguments on defense motions which are mentioned above.

On October 16, 1978, the parties entered into a stipulation which allowed consolidation of the hearing for preliminary injunctive relief with the final hearing on the merits. The matter came on for non-jury trial on October 15, 1979, with the plaintiffs appearing by their counsel, Lee B. Thompson, William J. Legg, Mona S. Lambird, S. Paul Hammons, William J. Sears, Harvey H. Cody, III, Clarence Conoley and Jack L. Underwood, and the defendant Oklahoma Tax Commission appearing through its lawyers, Marjorie Patmon and Donna E. Cox. The court, having heard the evidence of witnesses, having considered the arguments advanced by counsel, and having reviewed

the parties' proposed findings of fact and conclusions of law submitted subsequent to the hearing, finds that it lacks subject matter jurisdiction over plaintiffs' complaint for the reason that plaintiffs have a plain, speedy and efficient remedy in the Oklahoma State courts.

Title 28 U.S.C. § 1341, the Tax Injunction Act of 1937, provides:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

This proscription on its face applies to injunctive relief, and has been found equally applicable to claims seeking declaratory judgments and refund of taxes paid. *Great Lakes Dredge & Dock Co.* v. *Huffman*, 319 U.S. 293 (1943); *Bland* v. *McHann*, 463 F.2d 21 (5th Cir. 1972), *cert. denied*, 410 U.S. 966 (1973); *Kelly* v. *Springett*, 527 F.2d 1090 (9th Cir. 1975); *United States Pipe Line Co.* v. *Whitman*, 595 F.2d 323 (5th Cir. 1979).

If, however, uncertainty surrounds the adequacy of the State remedy then a federal district court is justified in retaining jurisdiction over the cause of action. *Hillsborough* v. *Cromwell*, 326 U.S. 620 (1976). Plaintiffs herein argue that more than uncertainty, there is absolute certainty that they have no remedy in the State courts of Oklahoma in that the Oklahoma Supreme Court has upheld the validity of the very tax and credit they challenge in *Post Oak Oil Co.* v. *Okla. Tax Commission*, 575 P.2d 964 (Okla. 1978). It is plaintiffs' fear that any State district court, being bound by the Oklahoma Supreme Court opinion, would certainly grant a motion to dismiss a suit such as the one filed herein.

The court is not persuaded by the plaintiffs' argument. Oklahoma has provided remedies for challenging the collection of taxes and for obtaining refunds thereon and the

court has heard no evidence that these remedies are inadequate.[1] Under the circumstances, a federal declaratory judgment, injunction or a money judgment for refund of taxes is prohibited. See *Coon* v. *Teasdale*, 567 F2d 820 (8th Cir. 1977); *Daytona Beach Rac. & Rec. Fac. Dist.* v. *City of Volusia*, 579 F.2d 367 (5th Cir. 1978), *cert. denied*, 440 U.S. 947 (1979).

Moreover, in response to plaintiffs' concern that the Oklahoma courts are no longer open to them, the court heard arguments at its October 15, 1979, hearing to the

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[1] Plaintiffs contend that the remedies provided by 68 O.S. §§ 225, 226 have been gutted by the legislative amendment to § 226 discussed above. It is plaintiffs' allegation that although the amended statute provides for legislative appropriation to a special fund from which refunds will be made in the event plaintiffs prevail in having the tax and corresponding credit declared unconstitutional, nothing mandates the legislature to make such an appropriation. Not only was the court presented with no evidence supportive of plaintiffs' distrust of the Oklahoma legislature, but the court cannot perceive how the plaintiffs would be any better off with this court granting them a money judgment than a State court doing the same. Even the plaintiffs appear to recognize that the money would come one way or the other from legislative appropriation in their June 21, 1978, Brief in Support of Plaintiffs' Response to Motion to Abstain and Dismiss of the Oklahoma Tax Commission:

> "But the tragedy of the whole thing is that what little remedy the plaintiffs ever had under the old laws (which we urge were inadequate even under their safeguards, since the Oklahoma Supreme Court has already ruled on the constitutionality of the Conservation Excise Tax), were taken away by House Bill No. 1303, which completely excised and deleted from the old statutes the protective provisions that taxes paid under protest would be held in trust or in escrow in a segregated account until the final disposition of this case. Thus, the money is no longer held in escrow or in a segregated account, but as hereinabove shown, must be deposited daily by the Tax Commission with the State Treasury, where it is available for state appropriation for other purposes *and we have to look to legislative appropriation to get any refund even after we win here.* (Emphasis added.)

effect that the Oklahoma legislature had amended the tax credit provisions of the challenged legislation to provide a tax credit to purchasers after the Oklahoma Supreme Court had upheld the legislation's validity in the *Post Oak*, *supra*, case. This could conceivably raise new issues in light of the court's dicta that the constitutionality of the credit was preserved in that the credits were allowed only the owners of the working or royalty interest rather than purchasers or consumers. In whatever manner this is ultimately resolved by the courts of Oklahoma, the remedy for its resolution exists.

Therefore, in accordance with the foregoing,

IT IS ORDERED that plaintiffs' complaint and cause of action therein stated be and the same is hereby dismissed.

The Clerk of the Court is directed to mail a copy hereof to counsel of record.

Dated this 28th day of April, 1980.

(s) *Luther B. Eubanks*
United States District Judge

ENTERED IN JUDGMENT DOCKET ON *April 28, 1980*

[Filed August 5, 1981]

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

CITIES SERVICE GAS COMPANY, et al Plaintiffs-Appellants	)	
v.	)	No. 80-2021
OKLAHOMA TAX COMMISSION, et al Defendants-Appellees	)	

Appeal from the United States District Court
for the Western District of Oklahoma
(D. C. No. CIV-78-0328-E)

Lee B. Thompson, Oklahoma City, Oklahoma, for Plaintiffs-Appellants (Alfred O. Holl, General Counsel, R. James Leithead, Assistant General Counsel, William J. Sears, Senior Attorney, Oklahoma City, Oklahoma for Plaintiff-Appellant Cities Service Gas Company; Edwin R. Sherwood, Colorado Springs, Colorado and Joel L. Green, Washington, D.C., for Plaintiff-Appellant Colorado Interstate Gas Company; Jack L. Underwood and Ms. Marcia Harley, Houston, Texas, for Plaintiff-Appellant El Paso Natural Gas Co.; Elmer J. Jackson, Vice-President, General Counsel and Secretary and Robert A. Miller, Jr., Lakewood, Colorado, for Plaintiff-Appellant Kansas-Nebraska Natural Gas Company, Inc.; William J. Legg, S. Paul Hammons, Mona S. Lambird, Andrews, Davis, Legg, Bixler, Milsten & Murrah, Inc., Oklahoma City, Oklahoma, and William W. Brackett, Daniel F. Collins, Brackett & Collins, Washington, D. C., and Steve H. Finch, Michigan Wisconsin Pipeline Company, Detroit, Michigan, for Plaintiff-Appellant Michigan Wisconsin Pipe-

line Company; Joseph M. Wells, Richard E. Terry and Emmitt C. House, Chicago, Illinois, for Plaintiff-Appellant Natural Gas Pipeline Company of America; Patrick J. McCarthy and Ms. Jane Alseth, Omaha, Nebraska, for Plaintiff-Appellant Northern Natural Gas Company; Clarence A. Conoley, Ms. Joan R. Huff, Kansas City, Missouri, and Wendell J. Doggett, Houston, Texas, for Plaintiff-Appellant Panhandle Eastern Pipe Line Company; Joseph F. Weiler, General Attorney, Transwestern Pipeline Company, Houston, Texas, for Plaintiff-Appellant Transwestern Pipeline Company, with him on the brief)

Bryce A. Baggett, Oklahoma City, Oklahoma, for Defendant-Appellee (Marjorie Patmon, General Counsel and Donna E. Cox, Attorney, Oklahoma Tax Commission, Oklahoma City, Oklahoma, with him on the brief)

Before DOYLE, McKAY, Circuit Judges, and CHILSON*, District Judge

DOYLE, Circuit Judge

This appeal is that of the plaintiffs in the court below, nine pipeline companies, which companies challenge the constitutionality of the Oklahoma Conservation Excise Tax, 68 O.S. § 1107, et seq. (1977), as related to the Tax Credit Act, 68 O.S. § 2357D (1977).

The action arose in the United States District Court for the Western District of Oklahoma. The plaintiffs sought a declaratory judgment that the taxes, the one, the excise tax and the other, the credit act, considered together, are unconstitutional. Injunction was sought on further collections, and it was prayed that a judgment be entered granting a refund of taxes previously paid.

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*Of the United States District Court for the District of Colorado, sitting by designation.

The district Court dismissed the action on the grounds that 28 U.S.C. § 1341, the so-called Tax Injunction Act of 1937, barred the federal court from exercising subject matter jurisdiciton over the claim. The plaintiffs' motion to amend or alter the order was denied, and this appeal followed.

Title 28 U.S.C. § 1341, the pertinent statutory provision, provides :

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under state law where a plain, speedy and efficient remedy may be had in the courts of such State.

It is undisputed that § 1341 applies to claims seeking declaratory judgments and refunds of taxes paid as well as injunctive relief. Great Lakes Dredge and Dock Co. v. Huffman, 319 U.S. 293 (1943); Bland v. McMann, 463 F.2d 21 (5th Cir. 1972), *cert. denied*, 410 U.S. 966 (1973); Kelly v. Springett, 527 F.2d 1090 (9th Cir. 1975); United Gas Pipe Line Co. v. Whitman, 595 F.2d 323 (5th Cir. 1979).

The position of the plaintiffs with respect to the above statute is that under Hillsborough v. Cromwell, 326 U.S. 620 (1946), if there is uncertainty surrounding the adequacy of the state remedy, a federal court should maintain jurisdiction over the claim. Plaintiffs contend that since in Post Oak Oil Co. v. Oklahoma Tax Commission, 575 P.2d 964 (Okla. 1978), the Oklahoma court upheld the constitutionality of the taxes in question, they are precluded from obtaining relief in the Oklahoma state courts. Therefore, plaintiffs argue that § 1341 is not operative and does not control this situation. This, then, is the issue which is presented and which determines the case. The question is whether there is a plain, speedy and efficient remedy as mentioned in § 1341, where the Supreme Court of Oklahoma has already spoken on the subject. The second question is whether this takes care of the necessity for pursuing a local remedy. In other words, if the state court has

spoken on the issue, does this take care of the problem and render § 1341 inapplicable? We think not.

In dismissing plaintiffs' cause of action, the trial court cited Non-Resident Taxpayers Association v. Municipality of Philadelphia, 478 F.2d 456 (3rd Cir. 1973). There the Third Circuit rejected the argument that plaintiffs did not have a plain, speedy and adequate remedy in the state court because the high court of the state in question had previously recognized the taxing power challenged by the plaintiffs. The Third Circuit held that *Hillsborough* does not hold that the unlikelihood of success in the state courts is sufficient reason to remove the case from the operation of the federal jurisdiction provision of § 1341. We agree with the position that the trial court took in holding that *Hillsborough* does not answer the question at issue in the case. Furthermore, there is a recent Supreme Court decision on point: Rosewell v. LaSalle National Bank, 49 U.S. Law Week, 2285 (March 24, 1981). This latter decision clearly indicates that the likelihood of plaintiff's success in the state court is not a factor to be considered when determining whether the jurisdictional prohibition of § 1341 applies.

Rosewell involved the challenge of an Illinois statute which required taxpayers to pay the full amount of taxes assessed by state officials, even if the assessed taxes greatly exceeded the amount due. Under state procedures, the excess monies paid in taxes would be refunded to the taxpayer in approximately one to two years without interest. The plaintiff maintained that the state laws requiring payment of taxes three and one-half times the lawful amount deprived her of equal protection and due process secured by the Fourteenth Amendment.

In *Rosewell*, there had been an exhaustion of administrative remedies by appealing the assessment of the property in question in 1974, 1975, 1976 and 1977. Each time the plainitff's challenge was unsuccessful. The sole remedy

under the Illinois law was the payment of the contested taxes under protest and the filing of an objection to the tax. In one to two years the tax would be refunded. Pursuant to two Illinois state court decisions, the plaintiff was unable to receive interest for the state's use of her money for that period. Clarendon Associates v. Korzen, 56 Ill.2d 101, 109, 306 N.E.2d 299, 303 (1973); Lakefront Realty Corp. v. Lorenz, 19 Ill.2d 415, 422-423, 167 N.E.2d 236, 240-241 (1960). The allegation, therefore, was that her state remedies were inadequate, and thus, 28 U.S.C. § 1341 did not preclude federal court jurisdiction over her claim. The Seventh Circuit agreed with the plaintiff's contentions. 604 F.2d 530 (7th Cir. 1979). But the Supreme Court reversed. It held that § 1341 prohibited federal court jurisdiction where a procedural remedy as opposed to a substantive remedy was available in the state court. Thus, it is not up to the court in which § 1341 is applied or is brought into play to evaluate the strength of the remedy which is available.

The Supreme Court recognized in *Rosewell* that plaintiff received no substantive relief in the state court. The Supreme Court held, nevertheless, that federal jurisdiction was barred by § 1341, and that that was the significant feature. Justice Stevens, joined by Justice Stewart, Justice Marshall and Justice Powell, dissented, stating that in enacting § 1341 Congress "did not intend an inadequate state remedy to oust a federal court's jurisdiction over a taxpayer's constitutional claim." 49 Law Week at 4293.

The dissenting opinion in *Rosewell* focused on the inadequacy of the state remedy because of the substance of that remedy. The dissent said that the question to be asked was whether the taxpayer had a sufficient remedy in the state court, and thus, a state "remedy" which would not afford relief, or which could afford only inadequate relief, was not intended to defeat federal jurisdiction. The majority, however, disagreed, and concluded that if minimal procedural remdeies are available for the taxpayer to chal-

lenge the validity of the tax the federal court must abstain. It was said in that opinion:

> The overall purpose of the Tax Injunction Act is consistent with the view that the "plain, speedy and efficient remedy" exception to the Act's prohibition was *only* designed to require that the state remedy satisfy certain procedural criteria * * *. 49 L.W. at 4290 (emphasis supplied).

The Court went on to hold that the Illinois state court refund procedure provided taxpayers with a "full hearing and judicial determination" at which to raise any constitutional objections to the tax, that the taxpayers could appeal to the higher Illinois courts, and that review was ultimately available in the Supreme Court. Therefore, the Court found that the plaintiff's sole remedy was in the state court.

In the case before us, 68 O.S. § 207 (1971) gives Oklahoma taxpayers the right to a full oral hearing before the Oklahoma Tax Commission in which all arguments may be presented. 68 O.S. 225 (1971) gives the taxpayer the right to appeal from the Commission's order directly to the Oklahoma Supreme Court. Under 68 O.S. § 226 (1971) the taxpayer may bring suit in the District Court of Oklahoma for recovery of taxes paid. These procedures meet the requirements set out by the Supreme Court that the state procedural remedy provide the opportunity for a "full hearing and judicial determination" of the plaintiffs' claim. Plaintiffs' argument that a full and fair hearing may not be available in the Oklahoma state court due to the prior decision in Post Oak Oil Co. v. Oklahoma Tax Commission, 575 P.2d 964 (Okla. 1978), which upheld the constitutionality of the tax in question, is no more valid than an argument that in *Rosewell* the plaintiff could not get a full and fair hearing in the Illinois state court because the county assessor had previously refused to correct her assessment, and Illinois courts had previously held that interest pay-

ments for overpayment of taxes were prohibited. The Supreme Court implicitly rejected that argument in *Rosewell*, and thus, we are compelled to reject that argument in the present case.

Nor are we in agreement with the argument of plaintiffs that Maryland v. Louisiana, 49 U.S. Law Week 4562 (May 26, 1981), applies to this case. In *Maryland*, the Supreme Court exercised its *original* jurisdiction because of serious and important concerns regarding federalism. The Court specifically stated that 28 U.S.C. § 1341 did not apply in cases involving the Court's original jurisdiction. 49 L.W. at 4567-8, note 21. Therefore, *Maryland* v. *Louisiana* is not applicable here.

In accordance, therefore, with the authorities cited above and the Supreme Court's ruling in *Rosewell* v. *LaSalle National Bank*, we have no option other than the affirmance of the district court's dismissal of this action for lack of subject matter jurisdiction.

Accordingly, we affirm the judgment of the district court.

[APPENDIX]

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

JULY TERM — August 31, 1981

Before Honorable Oliver Seth, Honorable William J. Holloway, Jr., Honorable Robert H. McWilliams, Honorable James E. Barrett, Honorable William E. Doyle. Honorable Monroe G. McKay, Honorable James K. Logan, and Honorable Stephanie K. Seymour, Circuit Judges, and Honorable Hatfield Chilson, District Judge*.

CITIES SERVICE GAS COMPANY, a corporation; COLORADO INTERSTATE GAS COMPANY, a corporation; EL PASO NATURAL GAS CO., a corporation; KANSAS-NEBRASKA NATURAL GAS COMPANY, INC., a corporation; MICHIGAN WISCONSIN PIPE LINE COMPANY, a corporation; NATURAL GAS PIPELINE COMPANY OF AMERICA, a corporation; NORTHERN NATURAL GAS COMPANY, a corporation; PANHANDLE EASTERN PIPE LINE COMPANY, a corporation; and TRANSWESTERN PIPELINE COMPANY,	)	No. 80-2021
Plaintiffs-Appellants,	)	
vs.	)	
OKLAHOMA TAX COMMISSION, LEO WINTERS, State Treasurer of Oklahoma,	)	
Defendants-Appellees.	)	

This matter comes on for consideration of appellants' petition for rehearing and suggestion for rehearing in banc in the captioned cause.

*Of the United States District Court for the District of Colorado, sitting by designation.

Upon consideration whereof, the petition for rehearing is denied by the panel to whom the case was argued and submitted.

The petition for rehearing having been denied by the panel to whom the case was argued and submitted, and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing in banc is denied.

(s) *Howard K. Phillips*
HOWARD K. PHILLIPS, Clerk

[APPENDIX]

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

JULY TERM — September 22, 1981

Before Honorable William E. Doyle, Honorable Monroe G. McKay, Circuit Judges, and Honorable Hatfield Chilson*.

CITIES SERVICE GAS COMPANY, a corporation; COLORADO INTERSTATE GAS COMPANY, a corporation; EL PASO NATURAL GAS CO., a corporation; KANSAS-NEBRASKA NATURAL GAS COMPANY, INC., a corporation; MICHIGAN WISCONSIN PIPE LINE COMPANY, a corporation; NATURAL GAS PIPELINE COMPANY OF AMERICA, a corporation; NORTHERN NATURAL GAS COMPANY, a corporation; PANHANDLE EASTERN PIPE LINE COMPANY, a corporation; and TRANSWESTERN PIPELINE COMPANY,	)	No. 80-2021
Plaintiffs-Appellants,	)	
v.	)	
OKLAHOMA TAX COMMISSION, LEO WINTERS, State Treasurer of Oklahoma,	)	
Defendants-Appellees.	)	

This matter comes on for consideration of the motion of plaintiffs-appellants for a stay of the mandate for 30 days, pending their petition for writ of certiorari.

Upon consideration whereof, the motion is granted and the mandate is stayed until October 22, 1981. If during the

*Of the United States District Court for the District of Colorado, sitting by designation.

period of the stay there is filed with the Clerk of the Court of Appeals, a notice from the Clerk of the Supreme Court that the plaintiffs-appellants have filed a petition for the writ in that court, the stay shall continue until final disposition by the Supreme Court. If, however, there is a failure to make timely filing for certiorari, the mandate shall issue on October 23, 1981, at 8:00 a.m.

(s) *Howard K. Phillips*
HOWARD K. PHILLIPS, Clerk

Appendix

Office - Supreme Court, U.S.
FILED
OCT 26 1981
ALEXANDER L. STEVAS

No. 81-733

In the Supreme Court of the United States

OCTOBER TERM, 1981

CITIES SERVICE GAS COMPANY, a corporation; COLORADO INTERSTATE GAS COMPANY, a corporation; EL PASO NATURAL GAS CO., a corporation; KANSAS-NEBRASKA NATURAL GAS COMPANY, INC., a corporation; MICHIGAN WISCONSIN PIPE LINE COMPANY, a corporation; NATURAL GAS PIPELINE COMPANY OF AMERICA, a corporation; NORTHERN NATURAL GAS COMPANY, a corporation, a division of InterNorth, Inc., a corporation; PANHANDLE EASTERN PIPE LINE COMPANY, a corporation; and TRANSWESTERN PIPELINE COMPANY, a corporation, *Petitioners*,

VERSUS

OKLAHOMA TAX COMMISSION and LEO WINTERS, STATE TREASURER OF OKLAHOMA, *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

SUPPLEMENTAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Lee B. Thompson
2120 First National Center
Oklahoma City, Oklahoma 73102
(405) 235-9305

Attorney for each and all of the Petitioners and Counsel of Record upon whom service is to be made

October, 1981

SUPPLEMENTAL APPENDIX

[APPENDIX]

STATEMENT

Pursuant to the long distance telephone advice from the office of the Clerk of this Court, that Revised Rule 28.1 was amended by Court Order in October, 1980, and in accordance with the Clerk's request, the following additional information is respectfully supplied:

PARENT COMPANIES AND SUBSIDIARIES OF THE PETITIONERS

Cities Service Gas Company

Parent Company: Cities Service Company
Tulsa, Oklahoma

Subsidiaries: None

Colorado Interstate Gas Company

Parent Company: The Coastal Corporation
Houston, Texas

Subsidiaries: CIG Exploration, Inc., Houston, Texas

**El Paso Natural Gas Co.*

Parent Company: The El Paso Company

Subsidiaries:

1st tier:

El Paso Products Company

NWC Corporation (formerly Narragansett Wire Company)

Compania Occidental de Gas, S.A., de Capital Variable

Pecos Company

West Lake Natural Gasoline Company

El Paso Natural Gas Building Company

El Paso-Algeria Company
El Paso Exploration Company
El Paso Offshore Company
El Paso International Company
El Paso Gas Transportation Company (Inactive)

2nd tier:

El Paso Polyolefins Company
El Paso Products Pipeline Company
Minera San Pedro Corralitos, S.A.
Odessa Natural Corporation
El Paso Maritime Company
BEM Holding Corporation (Inactive)
El Paso Products Service (Company) (Inactive)
Trebol Drilling Company (Inactive)
El Paso Products Sales Corporation (Inactive)

3rd tier:

Odessa Pipeline Company
El Paso Paul Kayser Tanker Company
El Paso Sonatrach Tanker Company
El Paso Consolidated Tanker Company
Odessa Natural Gasoline Company (Inactive)

Partnership interests of at least 50%:
Dart-El Paso Polyolefins

Kansas-Nebraska Natural Gas Company, Inc.

Parent Company: None

Subsidiaries:

Excelsior Oil Corporation	Delaware
Cap-Con International	Delaware
Western Gas Corporation	Kansas
Western Alfalfa Corporation	Kansas
Kan-Col Company	Kansas

Midlands Gas Corporation	Colorado
Wyoming Fuel Company	Colorado
Slurco, Inc.	Kansas
Midlands Transportation Company	Kansas
Northern Utilities, Inc.	Wyoming
Northern Gas Company	Wyoming
Northern Mountain Gas Company	Wyoming
North Central Energy Company	Colorado
Western Alfalfa Transportation Systems	Kansas

Michigan Wisconsin Pipe Line Company

*Parent Company: American Natural Resources Company

Subsidiaries:

ANR Production Company
American Natural Offshore Company
American Natural LNG Company
ANR Elba LNG Terminal Company
ANR LaSalle LNG Terminal Company

Natural Gas Pipeline Company of America

*Parent Company: Peoples Energy Corporation

Subsidiaries:

PGC Coal Gasification Company	Delaware
Peoples Offshore Company	Delaware
NAERCO, Inc.	Delaware
NGPL Exploration Company	Illinois
NAAACO, Inc.	Delaware
NALOCO, Inc.	Delaware
NANBCO, Inc.	Delaware
NAPECO, Inc.	Delaware
NATOCO, Inc.	Delaware

NGPL Overthrust, Inc.	Delaware
NGPL Terminal Company	Delaware
NGPL Trailblazer Inc.	Delaware
NGPL Canyon Compression Company	Delaware
Natural-Trinidad and Tobago Engineering Company	Delaware

Northern Natural Gas Company, a corporation, a division of InterNorth, Inc., a corporation

Parent Company: None

Subsidiaries:

Consolidated Gas and Oil, Limited (Canada)
Consolidated Gathering Systems Limited (Canada)
Consolidated Natural Gas Limited (Canada)
I N Holdings, Inc. (Delaware)
Nortex Gas & Oil Company (Delaware)
Northern Arctic Gas Company (Delaware)
Northern Arrow Inc. (Delaware)
Northern Coal Company (Delaware)
Northern Eagle Inc. (Delaware)
Northern Engineering International Co. (Delaware)
Northern Gas Products Company (Delaware)
Northern Helex Company (Delaware)
Northern Liquid Fuels International Ltd. (Delaware)
Northern Minerals Company (Delaware)
Northern Overthrust Pipeline Company (Delaware)
Northern Petrochemical Company (Delaware)
Northern Plains Natural Gas Company (Delaware)
It has a subsidiary: Northern Border Pipeline Corporation
Northern Propane Gas Company (Delaware)
Northern Trailblazer Pipeline Company (Delaware)

[APPENDIX]

Northern Vocational Training Company (Delaware)

The Protane Corporation (Delaware)

UPG, Inc. (Delaware)

InterNorth, Inc., also owns approximately forty-five percent (45%) of the outstanding voting securities of Consolidated Pipe Line Company (a Canadian corporation) and ninety-nine and four-tenths percent (99.4%) of the outstanding voting securities of Geni-Ghlor International, Inc. (a Delaware corporation)

Panhandle Eastern Pipe Line Company

Parent Company: None

Subsidiaries:

Anadarko Petroleum of Canada, Ltd.	Alberta, Canada
Anadarko Production Company	Delaware
Archon International Company	Delaware
Basin Production Company	Delaware
Century Refining Company	Delaware
Dixilyn-Field Drilling Company	Delaware
Pan Alaska Gas Company	Delaware
Pan Border Gas Company	Delaware
Pan Eastern Coal Company	Delaware
Pan Eastern Exploration Company	Delaware
Pan Gas Storage Company	Delaware
Panhandle Canadian Gas, Ltd.	Alberta, Canada
Panhandle Western Gas Company	Delaware
Pelmar Company	Delaware
The Youghiogheny and Ohio Coal Company	Ohio
Trunkline Gas Company	Delaware
Wycoalgas, Inc.	Delaware

Transwestern Pipeline Company

*Parent Company: Fannin Square Corporation, a wholly owned subsidiary of Texas Eastern Transmission Corporation

Subsidiaries:

Transwestern Coal Gasification Company

Transwestern Gas Supply Company

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*The parent company has other subsidiary Companies than this one. It is our understanding that Revised Rule 28.1 as amended does not call for them to be listed. If the names of these are desired, or will be helpful to the Court, please advise and we will promptly supply them.

CERTIFICATE OF SERVICE

I hereby certify that on the ..... day of October, 1981, three (3) copies of the Supplemental Appendix to Petition for a Writ of Certiorari were mailed, postage prepaid, to Counsel for the Respondents:

Ms. Marjorie Patmon, General Counsel
Ms. Donna E. Cox, Attorney
Oklahoma Tax Commission
2501 North Lincoln Boulevard
Oklahoma City, Oklahoma 73194; and

Mr. Bryce A. Baggett, Special Counsel
200 N. W. 63rd Street
Oklahoma City, Oklahoma 73116

and I further certify that all parties required to be served have been served.

.....

Lee B. Thompson
2120 First National Center
Oklahoma City, Oklahoma 73102
(405) 235-9305
Counsel for each and all of the Petitioners

Opposition

Office - Supreme Court, U.S.
FILED
NOV 18 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-733

In the Supreme Court of the United States

OCTOBER TERM, 1981

CITIES SERVICE GAS COMPANY, a corporation; COLORADO INTERSTATE GAS COMPANY, a corporation; EL PASO NATURAL GAS CO., a corporation; KANSAS-NEBRASKA NATURAL GAS COMPANY, INC., a corporation; MICHIGAN WISCONSIN PIPE LINE COMPANY, a corporation; NATURAL GAS PIPELINE COMPANY OF AMERICA, a corporation; NORTHERN NATURAL GAS COMPANY, a corporation, a division of InterNorth, Inc., a corporation; PANHANDLE EASTERN PIPE LINE COMPANY, a corporation; and TRANSWESTERN PIPELINE COMPANY, a corporation, *Petitioners*,

VERSUS

OKLAHOMA TAX COMMISSION and LEO WINTERS, STATE TREASURER OF OKLAHOMA, *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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Attorneys for Respondent, upon whom service is to be made.

November 18, 1981

QUESTION PRESENTED

The only question presented in this case is:

Is a plain, speedy and efficient remedy available to the Petitioners in the courts of Oklahoma?

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CITIES SERVICE GAS COMPANY, a corporation; COLORADO INTERSTATE GAS COMPANY, a corporation; EL PASO NATURAL GAS CO., a corporation; KANSAS-NEBRASKA NATURAL GAS COMPANY, INC., a corporation; MICHIGAN WISCONSIN PIPE LINE COMPANY, a corporation; NATURAL GAS PIPELINE COMPANY OF AMERICA, a corporation; NORTHERN NATURAL GAS COMPANY, a corporation, a division of InterNorth, Inc., a corporation; PANHANDLE EASTERN PIPE LINE COMPANY, a corporation; and TRANSWESTERN PIPELINE COMPANY, a corporation, *Petitioners,*

VERSUS

OKLAHOMA TAX COMMISSION and LEO WINTERS, STATE TREASURER OF OKLAHOMA, *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF RESPONDENT IN RESPONSE TO THE PETITION FOR WRIT OF CERTIORARI

Respondent Oklahoma Tax Commission respectfully submits that a Writ of Certiorari should not be issued. The judgment of the United States Court of Appeals is correct. It affirmed the judgment of the District Court dismissing Petitioners' Complaint on the ground that the

District Court lacked subject matter jurisdiction under 28 U.S.C. §1341 . . . *because* a plain, speedy and efficient remedy was and still is available to the Petitioners in the courts of Oklahoma.

THE OPINIONS BELOW

1. The Memorandum Opinion and Order entered April 28, 1980 by the United States District Court for the Western District of Oklahoma appears at pages 1a through 6a of the Appendix in the Petition for a Writ of Certiorai (hereafter "Petitioners' Appendix").

2. The Opinion of the United States Court of Appeals for the Tenth Circuit dated August 5, 1981, affirming the judgment of the District Court, 656 F.2d 584, appears at pages 7a through 13a of the Petitioners' Appendix.

STATEMENT OF JURISDICTION

Respondent acknowledges the correctness of the Statement of Jurisdiction on page 2 of the Petition for Writ of Certiorari.

THE PARTIES

The Oklahoma Tax Commission is the Respondent submitting this brief. Leo Winters, State Treasurer of Oklahoma, was added by Petitioners as a defendant below, but has not participated in this case since the hearing on April 19, 1978, when a temporary restraining order was denied. He is unnecessary as a party. The Oklahoma Tax Commission is exclusively designated by 68 O.S. 1980 Supp., §226(c) to represent the interests of the State of Oklahoma in such a case.

THE QUESTION PRESENTED FOR REVIEW AND THE STATUTE INVOLVED

The United States Court of Appeals for the Tenth Circuit affirmed the judgment of the United States District Court for the Western District of Oklahoma which dismissed the Complaint of Petitioners. In dismissing the Complaint the District Court cited and obeyed the command of 28 U.S.C. §1341, the Tax Injunction Act of 1937 (sometimes called "The Johnson Act") which provides:

> "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

Therefore, the only question presented in this case is:

> Is a plain, speedy and efficient remedy available to the Petitioners in the courts of Oklahoma?

The questions of substantive Federal law raised by Petitioners under the other constitutional and statutory provisions cited on pages 3 and 4 of that Petition can and will be adjuidcated by the courts of Oklahoma if and when those questions are duly presented by Petitioners to the courts of Oklahoma.

STATEMENT OF THE CASE

In 1977 the Oklahoma Legislature enacted the Oklahoma Conservation Excise Tax Act, House Bill 1441, which became 68 O.S. 1977 Supp., §1107-§1111, imposing a severance tax on gas. (Appendix to this brief, pages 1a-4a.) This new tax became effective January 1, 1978.

Oklahoma already had a 7% Gross Production Tax on gas before the conservation excise tax was enacted. The conservation excise tax was made to compliment that 7% gross production tax. The conservation excise tax is 7 cents per mcf *less 7% of the value of the gas* with the proviso that the conservation excise tax shall not exceed one-third of the value of the gas. Thus, the conservation excise tax operates mathematically only upon gas which has a price greater than 17.5¢ per mcf and less than $1.00 per mcf. The complimentary amounts of the conservation excise tax and the gross production tax are as follows:

If the wellhead price of an MCF of Gas is	The Oklahoma 7% Gross Production Tax on that Gas is	And the Oklahoma Conservation Excise Tax on that Gas is
17.5¢	1.225¢	5.775¢
20¢	1.4¢	5.6¢
30¢	2.1¢	4.9¢
40¢	2.8¢	4.2¢
50¢	3.5¢	3.5¢
60¢	4.2¢	2.8¢
70¢	4.9¢	2.1¢
80¢	5.6¢	1.4¢
90¢	6.3¢	0.7¢
$1.00	7.0¢	-0-

Thus, the gross production tax and the conservation excise tax combine to impose a total tax of 7¢ per mcf upon the severance of all gas sold for more than 17.5¢ per mcf and less than $1.00 per mcf. If the gas has a wellhead price below 17.5¢ or above $1.00 per mcf the conservation excise tax does not apply, but the 7 percent gross production tax does apply.

Contracts between producers and purchasers of gas ordinarily provide for the purchaser to reimburse the producer (and royalty owner) for severance taxes. A small percentage of the gas produced in Oklahoma is sold under contracts which do not contain such tax reimbursement provisions. The 1977 Oklahoma Legislature enacted House Bill 1439 which became 68 O.S. 1977 Supp., §2357, paragraph D, allowing a credit against income tax (or a cash refund) for unreimbursed severance taxes paid in excess of 7.085% of value. (Respondent's Appendix, pages 4a-8a). (The extra .085% was to take into account Oklahoma's other small tax on gas of .085 of 1% under 68 O.S. 1976 Supp., §1102, which finances the Interstate Oil Compact Commission.)

On November 18, 1977, before the conservation tax act became effective on January 1, 1978, Post Oak Oil Company, a producer, filed in the Supreme Court of Oklahoma a petition for a writ of prohibition against the tax. Three days later on November 21, 1977, Forrest Rozzell, an Arkansas consumer, also filed a petition for a writ of prohibition. These two original actions were consolidated. On February 21, 1978, the Supreme Court of Oklahoma published its opinion accepting original jurisdiction, but deny-

ing the writs of prohibition. *Post Oak Oil Company v. Oklahoma Tax Commssion*, 575 P.2d 964 (Okla., 1978).

On April 13, 1978, the Petitioners filed their Complaint in the United States District Court for the Western District of Oklahoma seeking to enjoin collection of the conservation excise tax, for a declaratory judgment that the tax was invalid and for recovery of the tax paid. The nine Petitioners purchase gas in Oklahoma and transport gas in interstate commerce for sale for resale.

Petitioners contend here, as they did in the courts below, that most of the conservation excise tax was imposed upon interstate gas and less of the tax was imposed upon intrastate gas because "most of the gas sold in Oklahoma for less than $1.00 per mcf was gas to be shipped in interstate commerce (while) intrastate gas, for the most part, sold for more than $1.00 per mcf." (Page 5 of Petition for Writ of Certiorari.)

It is not possible to determine how much of this conservation excise tax is paid on intrastate gas and how much is paid on interstate gas because the tax returns do not require taxpayers to separately report interstate and intrastate gas. No one really knows how much of this tax is paid on intrastate gas or how much is paid on interstate gas. All such figures are estimates based upon questionable assumptions.

Petitioners also contend that the tax credit in 68 O.S. 1977 Supp., §2357D favors intrastate producers and royalty owners and discriminates against interstate gas purchasers such as Petitioners. This contention ignores the 1978 amendment of Section 2357D in House Bill 1717. (Appendix, pages

9a-12a). This 1978 amendment became effective six days after Petitioners filed their Complaint. It allows the tax credit (or cash refund) to purchasers such as Petitioners as well as to producers and royalty owners. This amendment was enacted to countermand legislatively a portion of the opinion in the *Post Oak* case which had precluded purchasers from receiving the tax credit by interpreting the word "taxpayer" to mean only producers and royalty owners. *Post Oak Oil Company* v. *Oklahoma Tax Commission,* 575 P.2d at 968-969.

The Petitioners seek to excuse themselves for failing to pursue the plain, speedy and efficient remedies which could be had in the courts of Oklahoma by asserting:

> "Thus, the Petitioners here knew that if they endeavored to avail themselves of the State remedies, either administratively through the Oklahoma Tax Commission or by legal action through the District Courts, the Tax Commission would promptly file its Demurrer or Motion to Dismiss on the ground that the question had already been settled by the Oklahoma Supreme Court in the *Post Oak* case. They also knew that the Tax Commission or any district court, being bound by the Oklahoma Supreme Court Opinion, would sustain any such Demurrer or Motion to Dismiss." (Page 6 of Petition for a Writ of Certiorari.)

This statement is merely Petitioners' assumption as to the pleadings which the Respondent might file. This assumption wholly ignores the fact that the Petitioners as *purchasers* would have a different legal posture than the producer (Post Oak Oil Company) and the consumer (Forrest Rozzell) had in the *Post Oak* case, particularly after the

1978 amendment explicitly made the tax credit (or cash refund) available to purchasers.

It would be more reasonable to assume that Oklahoma's judicial officers would recognize and respect the obvious facts (1) that the nine Petitioners as purchasers of gas have a different legal posture than the producer and the consumer who were involved in the *Post Oak* decision and (2) that the constitutional validity of the tax credit would have to be re-examined in light of the 1978 amendment of Section 2357D. It is also more reasonable to assume that if the Petitioners, in a case before the Oklahoma Tax Commission or the State District Court, asked for the opportunity to present their evidence and constitutional arguments, that the Tax Commission would withhold the filing of a Demurrer until after the Petitioners had presented their evidence and arguments, or that the trial judge or Tax Commission would defer ruling upon a Demurrer until after the evidence and arguments were presented in order to accommodate the Petitioners in making their record. Such accommodations to allow the making of a record are not unusual.

Under such procedure the Petitioners could have pursued their remedies in the courts of Oklahoma through an appeal to the Supreme Court of Oklahoma where their constitutional arguments could have been presented and adjudicated. Then, if the Supreme Court of Oklahoma upheld the constitutionality of the Oklahoma Conservation Excise Tax Act against the Petitioners' contention that such tax act was repugnant to the Constitution or laws of the United States, the Petitioners would have had the right of appeal to this Court under 28 U.S.C. §1257(2).

It is unjustified for the Petitioners to assume that the Oklahoma Tax Commission and the Judges and Justices of Oklahoma would have prevented the Petitioners from having their opportunity for a "full hearing and judicial determination" of Petitioners' constitutional claims. The Respondent respectfully submits that Petitioners cite no facts to justify such negative assumptions about the Oklahoma Tax Commission or the judicial officers of Oklahoma.

RESPONDENT'S ARGUMENT FOR DENYING A WRIT OF CERTIORARI

Respondent's argument is in two parts. The first part is a seriatim response to Petitioners' arguments. The second part is Respondent's counter-argument.

Response to Petitioners' Arguments

This response to Petitioners' arguments is set forth in numbered and lettered paragraphs corresponding to those used on pages 8 through 17 of the Petition for a Writ of Certiorari.

1. The opinions of the District Court and the Court of Appeals are not in conflict with the opinions of this Court. On the contrary, the opinions below follow the direction recently given in *Rosewell* v. *LaSalle National Bank*, ... U.S. ....., 101 S.Ct. 1221, 67 L.Ed.2d 464 (March 24, 1981).

A. *Maryland* v. *Louisiana*, ... U.S. ....., 101 S.Ct. 2114, 69 L.Ed.2d 576 (May 21, 1981), is inapposite and irrelevant to the only issue in this case; *i.e.*, whether 28 U.S.C. §1341 precluded the District Court from enjoining

the State tax because a plain speedy and efficient remedy was available in the courts of Oklahoma. In Footnote 21 to its opinion in the *Maryland* opinion, this Court stated that 28 U.S.C. §1341 did not apply to that case because it involved this Court's original jurisdiction.

B. Several plain, speedy and efficient remedies may be had in the courts of Oklahoma by persons who complain that an Oklahoma tax statute is invalid on constitutional grounds.

Even before an Oklahoma tax becomes due, a person who may become liable for that tax can attack the tax statute on constitutional grounds through a declaratory judgment action *Oklahoma Tax Commission* v. *Smith*, 610 P.2d 794 (Okla., 1980).

The Uniform Tax Procedure Code of Oklahoma (68 O.S. 1971, §201 through §246) provides three other plain, speedy and efficient remedies, each including the right of judicial review in the Supreme Court of Oklahoma, for anyone who complains that an Oklahoma tax statute is invalid on constitutional grounds. Section 207 empowers the Oklahoma Tax Commission to conduct hearings and gives protesting taxpayers the right to a hearing before the Commission in which evidence is received and legal arguments are heard. From any order assessing tax issued by the Commission after such a hearing, the taxpayer has the right to appeal directly to the Supreme Court of Oklahoma under Section 225. If the appeal is from an order assessing tax, the taxpayer has the option to either pay the tax or post a bond.

Section 226 authorizes a taxpayer to pay the tax and bring a suit in the State District Court for the recovery of such tax. In the State District Court the taxpayer may even have a trial by jury on the issues of fact. *Hamil* v. *Walker*, 604 P.2d 377 (Okla., 1979).

Section 221 authorizes claims for refund of a tax. Section 228 gives the taxpayer the right to a hearing before the Commission on his claim for a refund and the right of direct appeal to the Supreme Court of Oklahoma from a decision of the Commission denying such a claim for a refund of taxes.

The decision by the Supreme Court of Oklahoma in *Post Oak Oil Company* v. *Oklahoma Tax Commission*, 575 P.2d 964 (Okla., 1978), does not mean that a plain, speedy and efficient remedy can not be had in the courts of Oklahoma by these nine Petitioners who were not parties in the *Post Oak* case. The parties in the *Post Oak* case were an Oklahoma producer and an Arkansas consumer. These nine Petitioners are "natural gas companies" who purchase for transportation and resale in interstate commerce. Moreover, the income tax credit under 68 O.S. 1977 Supp., § 2357D, was amended, effective April 19, 1978, to allow the tax credit to gas purchasers such as these nine Petitioners. That amendment became effective six days after the Petitioners' Complaint was filed in the District Court. This was a critical point in the *Post Oak* opinion and the Supreme Court of Oklahoma has not ruled upon the validity of the tax or the credit since that amendment was enacted.

Petitioners' argument that no remedy is available in the courts of Oklahoma due to the decision in the *Post*

Oak case is no more valid than the argument made in *Rosewell* v. *LaSalle National Bank*, supra, that the plaintiff in that case could not get a full and fair hearing in the Illinois State Court. This Court implicitly rejected that argument in *Rosewell* v. *LaSalle National Bank*, supra, as noted by the Court of Appeals in its opinion. (Petitioners' Appendix, page 13a).

Petitioners argue that the remedy available in the courts of Oklahoma is "uncertain" and rely upon *Township of Hillsborough* v. *Doris Duke Cromwell*, 326 U.S. 620, 66 S.Ct. 445, 90 L.Ed. 358 (1946). In the *Hillsborough* case the New Jersey courts had ruled that a taxpayer who had been singled out for discriminatory taxation could not obtain equalization by reducing his own assessment, but was restricted to proceedings to increase the assessments of fellow taxpayers. That remedy did not protect Doris Duke Cromwell's rights under the Federal Constitution. In response, the collector of Hillsborough Township argued that subsequent decisions of the New Jersey courts had adopted a different rule, but this Court examined those subsequent New Jersey decisions and found them less than clear on the point. This Court concluded:

> "In any event, there is such *uncertainty* concerning the New Jersey remedy as to make it speculative . . . whether the State affords full protection to the federal rights. In the second place, the state board of tax appeals to which the respondent might have appealed concededly has no right to pass on constitutional questions. Its judgments may be reviewed by the New Jersey Supreme Court by certiorari. The allowance of that writ, however, is not a matter of right, but purely discretionary. And the refusal of a writ of certiorari by the Supreme Court may not

> be judicially reviewed by the Court of Errors and Appeals. Accordingly, we conclude that there was such uncertainty surrounding the adequacy of the state remedy as to justify the District Court in retaining jurisdiction of the cause." 326 U.S., at 625-626, 66 S.Ct., at 449.

Hillsborough is inapposite to this case because in Oklahoma the State District Courts and the Oklahoma Tax Commission do have the right to adjudicate constitutional questions, litigants do have the right of direct appeal to the Supreme Court of Oklahoma, and litigants are not limited to the discretionary writ of certiorari.

2. Petitioners assert that consumers will be adversely affected if this Court does not grant the writ of certiorari. The same could be said of every tax which 28 U.S.C. §1341 relegates to State courts.

3. The amount of tax involved is irrelevant to the issue under 28 U.S.C. §1341. Oklahoma's courts are capable of handling a case involving $113 million in taxes.

4. The District Court and the Court of Appeals did not err when they ruled that the lack of jurisdiction under 28 U.S.C. §1341 precluded consideration by the United States District Court of the substantive constitutional issues which Petitioners should have presented to the courts of Oklahoma.

A. The substantive arguments presented by the Petitioners in numbered subparagraphs 1 through 6 (pages 10 and 11 of Petition) can and will be decided by the Supreme Court of Oklahoma, *subject to appellate review by this Court*, if and when the Petitioners pursue their plain,

speedy and efficient remedy in the courts of Oklahoma. The U. S. District Court below lacked jurisdiction under 28 U.S.C. §1341 to consider those substantive constitutional issues. Respondent will not respond in this brief to those substantive arguments because they are irrelevant to the Section 1341 issue. The Commission does deny that the Oklahoma conservation excise tax discriminates against interstate commerce, either on its face or in its application and operation. Interstate gas and intrastate gas are taxed alike, without distinction. The tax credit (or cash refund) is allowed without regard to whether the gas is interstate or intrastate.

B. The District Court below did not rule that it was bound by the opinion of the Oklahoma Supreme Court in the *Post Oak* case.

C. The Federal courts have exclusive jurisdiction over *violations* of the Natural Gas Act or the rules, regulations and orders thereunder, but the Petitioners did not establish that the Oklahoma conservation excise tax or the tax credit constitute a violation of the Natural Gas Act. It is noteworthy that the Federal Energy Regulatory Commission did not bring this action nor has it chosen to intervene herein.

5. The Court of Appeals did not err in following *Rosewell* v. *LaSalle National Bank*, supra. The Opinion in *Rosewell* is directly pertinent to the Section 1341 issue in this case.

A. The fact that the plaintiff in the *Rosewell* case failed or refused to pay the tax was irrelevant to the principle enunciated in the *Rosewell* opinion that the availability to the taxpayer of the opportunity for a "full hearing and

judicial determination" of the taxpayer's claim was sufficient to satisfy the Section 1341 requirement of "a plain, speedy and efficient remedy."

B. The fact that the taxpayer in *Rosewell* abandoned her appeal before the Cook County Board of Appeals was irrelevant. These Petitioners, unlike the taxpayer in *Rosewell,* failed to even try their state remedies before resorting to the Federal Court.

C. Petitioners' assertion that the *Post Oak* decision forecloses state remedies does not convert that assertion into a fact. The District Court below specifically ruled that the 1978 amendment of the tax credit provisions "could conceivably raise new issues in light of the Court's dicta that the constitutionality of the credit was preserved in that the credits were allowed only to the owners of the working or royalty interest rather than purchasers or consumers." (Petitioners' Appendix, page 6a)

D. The *Rosewell* taxpayer's reliance upon the failure of Illinois to pay interest on her refund was not important to the *Rosewell* decision.

E. The fact that the *Rosewell* taxpayer cast her complaint as a civil rights action under 42 U.S.C. §1983 and 28 U.S.C. §1343 was irrelevant to the decision. This Court stated in its Footnote 12: "In any event, our resolution of this case makes it unnecessary to address this additional contention." 101 S.Ct., at 1228.

F. Petitioners assert that the Illinois Supreme Court had not already ruled adversely to the taxpayer's claim, but the extensive review of Illinois law and rulings set forth in the *Rosewell* opinion and in its Footnotes 6

and 7 indicate that the highest courts of Illinois had ruled against the taxpayer's claim even more explicitly than the Oklahoma Supreme Court in the *Post Oak* case ruled against claims which are similar, but not identical, to the claims of Petitioners.

C. The *Rosewell* opinion (101 S.Ct. 1221, 1229) quoted Senator Bone, primary sponsor of the Tax Injunction Act (28 U.S.C. §1341), that its provision for a "plain, speedy and efficient remedy" were meant to assure "a full hearing and judicial determination of the controversy." These Petitioners can have a "full hearing and judicial determination of the controversy" in the courts of Oklahoma.

H. The *Rosewell* taxpayer ". . . made no argument that the Illinois refund procedure is uncertain or otherwise unclear." The opinion observed: "There is no question that under the Illinois procedure the court will hear and decide any Federal claim." 101 S.Ct., at 1231. The courts of Oklahoma will hear and decide any Federal claim which Petitioners present.

I. Petitioners quote from the *Rosewell* opinion (101 S.Ct., at 1231): "Because the Illinois remedy imposes no unusual hardship on respondent requiring ineffectual activity or an unnecessary expenditure of time or energy, we can not say that it is not 'efficient'." Petitioners then state that Petitioners will have to start all over, after three and one-half years, to pursue their Oklahoma remedies. It was the Petitioners who made the mistake of beginning in the Federal courts and, therefore, the ineffectual activity and unnecessary expenditure of time or energy are attributable to Petitioners.

J. Petitioners quote the last sentence of Footnote 22 to the *Rosewell* opinion (101 S.Ct, at 1232) to the effect that the Federal District Court would consider the fact that the taxpayer had been forced to take remedial action for six consecutive years, two of which years were *after* the Circuit Court of Cook County rendered its judgment in favor of taxpayer. It was "these new facts" which the opinion footnote said could be presented in her pending suit in the Federal District Court. These Petitioners have never submitted any facts or claims to an Oklahoma court as the *Rosewell* taxpayer did repeatedly to the Illinois courts.

K. Petitioners quote only half of the concluding sentence in the *Rosewell* opinion (101 S.Ct., at 1237), and from that partial quotation infer that the lack of interest on a tax refund was the gist of the holding. The full concluding sentence was: "Accordingly, we hold that Illinois' legal remedy that provides property owners paying property taxes under protest a refund without interest in two years is 'a plain, speedy and efficient remedy' under the Tax Injunction Act." Oklahoma's available remedies likewise provide "a plain, speedy and efficient remedy" in the courts of Oklahoma.

L. The fact that remedies available in the courts of Oklahoma do not include injunctive relief against a tax is irrelevant to the question of whether the Oklahoma courts provide "a plain, speedy and efficient remedy." In Oklahoma's courts the Petitioners could attack the tax statute on constitutional grounds through a declaratory judgment action. *Oklahoma Tax Commission* v. *Smith*, 610 P.2d 794 (Okla., 1980). These Petitioners have not alleged that

any of them lacked the funds to pay this tax while challenging its validity.

M. Petitioners assert that *Tully* v. *Griffin*, 429 U.S. 68, 97 S.Ct. 219, 50 L.Ed.2d 227 (1976), which was cited and relied upon in the *Rosewell* opinion is distinguishable because the taxpayer Tully had the right under New York law to a preliminary injunction against collection of the taxes while he was litigating the question in the New York courts. These Petitioners state that they have no such remedy in Oklahoma. There are three answers. First, Petitioners could have used the declaratory judgment procedure during the seven months after the Conservation Excise Tax Act was enacted, but before it became effective on January 1, 1978. Second, the speed of direct appeal from the Oklahoma Tax Commission to the Supreme Court of Oklahoma greatly lessens the need for injunctive relief against the collection of taxes pendant lite. Third, the Petitioners could post a bond rather than pay the tax.

N. The brief of Petitioners (pages 16 and 17) quotes from the dissenting opinion of Justice Stevens the sentence "A futile state remedy is not significantly different from no remedy at all." (101 S.Ct. 1221, 1241.) The remedies readily available to Petitioners in the courts of Oklahoma are not "futile".

O. Petitioners stop distinguishing the *Rosewell* opinion and attack it with the statement that it "was a 5-4 opinion." Petitioners state: "The fifth concurring opinion was by Justice Blackmun and he emphasized his great reluctance and his severe misgivings." (Page 17 of the Petition for a Writ of Certiorari.) Respondent responds

by noting that many of the great principles of Federal law were first enunciated in 5-4 opinions. An important principle is this Court's "recognition of the imperative need of a State to administer its own fiscal operations." *Tully* v. *Griffin Inc.*, supra, 429 U.S., at 73, which was quoted in the *Rosewell* case, 101 S.Ct., at 1233. Congress had the right to adopt the policy of Federalism expressed in 28 U.S.C. §1341. In *Rosewell* this Court was respecting and giving effect the right of Congress to enact that policy. The dissenting opinion in the *Rosewell* case does present worthy and respectable arguments, but if those arguments were adopted the Tax Injunction Act would be reduced to a much smaller scope and the volume of litigation in the Federal courts would be greatly increased. The Petitioners in Oklahoma have "plain, speedy and efficient remedies" available to them which are far superior to the Illinois remedies which were available to the *Rosewell* taxpayer, the inequity of which was the primary focus of the dissenting opinion.

Respondent's Counter-Argument —
The Reasons for Denying the Writ

The writ of certiorari should be denied in the exercise of sound judicial discretion because there are no special and important reasons for issuing a writ.

The decision of the Court of Appeals in this matter is not in conflict with the decision of any other court of appeals on the same matter. The important question of federal law, under 28 U.S.C. §1341 was recently settled by this Court in *Rosewell* v. *LaSalle National Bank*, supra, and the Court of Appeals followed the *Rosewell* opinion in affirming the judgment of the District Court.

Important federal policies are embodied in the Tax Injunction Act, 28 U.S.C. §1341. It is sound policy to require persons who complain that a State tax is invalid upon constitutional grounds to litigate their complaints first in State courts (1) to minimize Federal intrusion upon vital functions of State government, (2) to obtain the definitive interpretation of the State tax statute by the highest court of that State before measuring it against Federal constitutional and statutory provisions, and (3) to avoid unnecessarily burdening the Federal District Courts with cases which should be heard first by State courts.

Moreover, the authority of Congress in this matter should be respected by full adherence to the policy decision which Congress made when it enacted 28 U.S.C. §1341.

> "The Tax Injunction Act embodied Congress' decision to transfer jurisdiction over a class of substantive federal claims from the federal district courts to the state courts, as long as state court procedures were 'plain, speedy and efficient' and final review of the substantive Federal claim could be obtained in this Court." *Rosewell* v. *LaSalle National Bank*, 101 S.Ct., at 1230, footnote 19.

The plain, speedy and efficient remedy available to the Petitioners in the courts of Oklahoma includes a final review of their substantive federal claims by the Supreme Court of the United States under 28 U.S.C. §1257(2) as an inherent part of the remedies available.

CONCLUSION

The writ of certiorari should be denied. The United States Court of Appeals for the Tenth Circuit correctly followed *Rosewell*. The District Court correctly applied 28 U.S.C. §1341. A plain, speedy and efficient remedy may be had in the courts of Oklahoma.

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November 18, 1981

APPENDIX

OKLAHOMA HOUSE BILL No. 1441

AN ACT RELATING TO REVENUE AND TAXATION; STATING LEGISLATIVE PURPOSE; PROVIDING FOR A CONSERVATION EXCISE TAX ON NATURAL GAS AND/OR CASINGHEAD GAS; PROVIDING PROCEDURES FOR COMPUTATION AND PAYMENT; ESTABLISHING A SPECIAL FUND; DIRECTING CODIFICATION; AND PROVIDING AN EFFECTIVE DATE.

Be it enacted by the People of the State of Oklahoma:

SECTION 1. Legislative intent

It is hereby declared the intent of the Legislature to levy a conservation tax on the severance of natural gas and/or casinghead gas to be used for the following purposes:

1. To provide funds for energy conservation or energy research programs for Oklahoma;

2. To provide funds for unfunded liabilities of public retirement system; and

3. To provide funds for the general government of the State of Oklahoma.

SECTION 2. Conservation excise tax

A. There Is hereby levied on all natural gas and/or casinghead gas produced and saved (excluding non-taxable royalty) a conservation excise tax of seven cents ($0.07) per thousand cubic feet (MCF), less seven percent (7%) of the gross value of each such MCF of natural gas and/or casinghead gas; provided that the conservation excise tax hereby levied shall not exceed one-third (1/3) of the gross value of each such MCF of the natural gas and/or casinghead gas so produced and saved. Provided further, the conservation excise tax herein levied shall never be less than zero.

B. For the purposes of this section, natural gas and/or casinghead gas, when produced and utilized in any manner, shall be considered as the amount of gas produced and saved, except gas which is:

1. Injected into a formation for the purpose of recycling, repressuring or pressure maintenance or for any other purpose which enhances the ultimate recovery of oil or other hydrocarbons;

2. Lawfully vented or flared;

3. Used in a gas-lift operation or field operations;

4. Used in the operation of compression facilities or of gasoline or recycling plants; or

5. Attributable to the shrinkage volume for the extraction of liquid hydrocarbons.

C. The purchaser of the natural gas and/or casinghead gas shall remit that portion of the tax for which the producer and/or the royalty owner is reimbursed by the purchaser. The producer and/or royalty owner shall remit that portion of the tax for which he is not reimbursed by the purchaser. The tax levied by this section shall be due at the end of any month in which the accrued total due from the remitter reaches One Hundred Thousand Dollars ($100,000.00); however, the tax due shall not be required to be remitted more frequently than once per calendar month. The tax will be considered delinquent forty-five (45) days after it becomes due. A remitter whose total tax due fails to reach One Hundred Thousand Dollars ($100,000.00) during any calendar year shall remit the taxes accrued for that year by February 1 of the year following accrual.

D. In addition to any other data sent monthly to a producer and/or the royalty owner, the purchaser shall also furnish an accounting of the non-reimbursed conservation tax liability which is due and remittable by the producer and/or the royalty owner.

E. Any tax reimbursement received as a result of taxes levied under this section shall not be considered by the Oklahoma Tax Commission as part of the gross value for the computation of gross production taxes, petroleum excise taxes or the tax herein levied.

SECTION 3. Reports—Forms—Rules and regulations

The Oklahoma Tax Commission is authorized and empowered to prescribe and promulgate all necessary report forms, rules and regulations for the purpose of making and filing of all reports necessary for the enforcement of this act.

SECTION 4. Liability for tax—Liens—Release from liability

The tax herein levied shall attach to and is the liability of the working interest and royalty interest owners' interests in all natural gas and/or casinghead gas produced and saved in the State of Oklahoma. In addition, the tax herein levied shall, at all times, be and constitute a first and paramount lien against the producer's and/or royalty owner's property, both real and personal. Moreover, the provisions herein requiring the purchaser of the natural gas and/or casinghead gas to remit that portion of the tax for which the producer and/or royalty owner is reimbursed by the purchaser shall not release the producer and/or royalty owner from liability to pay the same, in all cases where such tax fails to be remitted by the purchaser.

SECTION 5. Special Conservation Fund

There is hereby created in the State Treasury a special fund to be designated the "Special Conservation Fund" in which ten percent (10%) of the receipts received by the Oklahoma Tax Commission from the tax levied by this act shall be credited monthly. No money on deposit with the State Treasurer to the credit of the Special Conservation Fund shall be expended except pursuant to legislative appropriation.

The remaining ninety percent (90%) of the monthly receipts received from the conservation excise tax levied by this act shall be credited monthly by the State Treasurer to the Oklahoma Public Employees' Retirement Fund.

SECTION 6. Codification

Sections 1 through 5 of this act shall be codified in the Oklahoma Statutes as Sections 1107 through 1111 of Title 68, unless there is created a duplication in numbering.

SECTION 7. Effective Date

This act shall become effective January 1, 1978.

Approved May 30, 1977.

TAXATION—INCOME TAX—CREDITS

CHAPTER 47

H.B. No. 1439

AN ACT RELATING TO REVENUE AND TAXATION; AMENDING 68 O.S.1971, SECTION 2357, AS AMENDED BY ENROLLED SENATE BILL NO. 155 OF THE 1ST SESSION OF THE 36TH OKLAHOMA LEGISLATURE; PROVIDING FOR CERTAIN ALLOWABLE TAX CREDITS AND ADDING TAX CREDIT FOR EXCISE TAXES UNDER CERTAIN CONDITIONS; AND DECLARING AN EMERGENCY.

Be it enacted by the People of the State of Oklahoma:

SECTION 1. 68 O.S.1971, Section 2357, as amended by Enrolled Senate Bill No. 155 of the 1st Session of the 36th Oklahoma Legislature, is amended to read as follows:

§ 2357. Credits against tax

A. The withheld taxes and estimated taxes paid shall be allowed as credits as provided by law.

B. 1. There shall be allowed as a credit against the tax imposed by Section 2355 of this title the amount of tax paid another state by a resident individual, as defined in Section 2353, paragraph 4, of this title, upon income received as compensation for personal services in such other state. The credit shall not exceed such proportion of the tax payable under Section 2355 of this title as the compensation for personal services subject to tax in the other state and also taxable under Section 2355 bears to the Oklahoma adjusted gross income as defined in Section 2353, paragraph 13, of this title.

2. For tax years beginning after December 31, 1975, there shall be allowed to a resident individual or part-year resident individual as a credit against the tax imposed by Section 2355 of this title twenty percent (20%) of the credit for child care expenses allowed under the Internal Revenue Code of the United States. The credit shall not exceed the tax imposed by Section 2355 of this title. The maximum child care credit allowable on the Oklahoma Income tax return shall be prorated on the ratio that Oklahoma adjusted gross income bears to the federal adjusted gross income.

C. 1. Every taxpayer who operates a manufacturing establishment in the State of Oklahoma shall be allowed a direct credit against income taxes owed by such taxpayer to the State of Oklahoma, the amount of which credit shall be proportioned to the amount of gas used or consumed in Oklahoma by such taxpayer in the operation of a manufacturing establishment, at a rate of three mills per thousand cubic feet of gas used or consumed after May 1, 1971, and during each taxable year of such taxpayer provided that the credit allowed herein shall not apply to the first twenty-five thousand MCF of gas used or consumed after May 1, 1971, and during each taxable year of such taxpayer.

2. As used in this subsection:

a. "Manufacturing establishment" means a plant or establishment which engages in the business

of working raw materials into wares suitable for use or which gives new shapes, new qualities or new combinations to matter which has already gone through some artificial process.

b. "Gas used or consumed" shall include all natural or casinghead gas used in the operation of the manufacturing establishment for whatever purposes, but shall not include the following:

(1) Gas which, after being severed from the earth, is subsequently injected into a formation in the State of Oklahoma for the purpose of storing, recycling, repressuring or pressure maintenance.

(2) Gas vented or flared directly into the atmosphere.

(3) Gas used for fuel in connection with the operation and development for or production of oil or gas in the field where produced.

(4) Gas, any part of which is resold by the manufacturing establishment, except as to that part and quantity of the gas which is actually used by the establishment and not resold.

c. "One thousand cubic feet of gas" (MCF) means that quantity of gas which, measured at a pressure of 15.025 pounds per square inch absolute and at a temperature of 69° Fahrenheit, would have the volume of one thousand cubic feet.

D. 1. There shall be allowed as a credit against the tax imposed by Section 2355 of this title the excise taxes levied by the State of Oklahoma on asphalt, ores bearing lead, zinc, jack, gold, silver, copper, petroleum or other crude oil or other mineral, oil, natural gas and/or casing-

head gas or coal where the combined total of such taxes amounts to more than seven and eighty-five one-thousandths percent (7.085%) of the gross value of production of the mineral, oil, gas or coal produced, as follows:

a. If, under the terms of a contract between a producer and his purchaser which has continued in force since December 31, 1976, the excise taxes in excess of seven and eighty-five one-thousandths percent (7.085%) are not reimbursed to a taxpayer, then that unreimbursed portion of the excise taxes in excess of seven and eighty-five one-thousandths percent (7.085%) shall be allowed as a direct credit against income taxes owed by the taxpayer to the State of Oklahoma.

b. If the taxpayer elects to take the tax credit, the credit shall not be limited to the tax liability under Section 2355 of this title. If the tax credit exceeds the liability, the taxpayer may apply for a refund.

2. Any excise taxes for which the taxpayer is actually reimbursed shall not be included as a credit against the tax imposed by Section 2355 of this title, regardless of the contract provisions.

3. No excise taxes paid by a taxpayer, whether reimbursed or not under the terms of contracts entered into or renegotiated, as to tax-reimbursement provisions, after December 31, 1976, shall be allowed as a credit against the Oklahoma income tax under Section 2355 of this title by the taxpayer.

E. No additions to tax shall be made in Oklahoma income tax returns by reason of the recapture or restoration of credits under the Internal Revenue Code, and no other credits against tax shall be allowed in Oklahoma Income tax returns except as follows:

1. Those credits provided in this section.

2. Those credits authorized by Sections 921 through 925 of Title 82, Oklahoma Statutes and/or Sections 2001 through 2008 of Title 63, Oklahoma Statutes, which have been, or may hereafter be, certified pursuant to applications therefor made on or before March 22, 1971. Provided, the total amount of the credits referred to in this subparagraph 2, to be taken by taxpayer shall not exceed the certified net investment cost of the facilities and/or processes to which such credits pertain, reduced by the greater of:

a. the reduction in federal income tax of taxpayer as the result of deducting depreciation on such facilities and/or processes, and/or deducting nondepreciable costs for which credit has been so certified, or

b. the increase in the amount of Oklahoma Income tax that would result if taxable income were increased by the amount deducted as set forth in subparagraph a., above.

And, provided further, that, after such credits have been exhausted, taxpayer shall each year thereafter adjust taxable income by adding any depreciation taken on such facilities and/or processes, and/or any nondepreciable costs having been included in the net investment cost allowed as credit, and which depreciation and/or costs have been allowed as a deduction in arriving at federal taxable income for such year.

Approved May 11, 1977. Emergency.

H.B. No. 1717

AN ACT RELATING TO REVENUE AND TAXATION; AMENDING 68 O.S.1971, SECTION 2357, AS LAST AMENDED BY SECTION 1, CHAPTER 47, O.S.L.1977 (68 O.S.SUPP.1977, SECTION 2357); PROVIDING FOR CREDITS AGAINST INCOME TAXES, AND DECLARING AN EMERGENCY.

Be it enacted by the People of the State of Oklahoma:

SECTION 1. 68 O.S.1971, Section 2357, as last amended by Section 1, Chapter 47, O.S.L.1977 (68 O.S.Supp.1977, Section 2357), is amended to read as follows:

§ 2357 Credits against tax

A. The withheld taxes and estimated taxes paid shall be allowed as credits as provided by law.

B. 1. There shall be allowed as a credit against the tax imposed by Section 2355 of this title the amount of tax paid another state by a resident individual, as defined in Section 2353, paragraph 4, of this title, upon income received as compensation for personal services in such other state. The credit shall not exceed such proportion of the tax payable under Section 2355 of this title as the compensation for personal services subject to tax in the other state and also taxable under Section 2355 bears to the Oklahoma adjusted gross income as defined in Section 2353, paragraph 13, of this title.

2. For tax years beginning after December 31, 1975, there shall be allowed to a resident individual or part-year resident individual as a credit against the tax imposed by Section 2355 of this title twenty percent (20%) of the credit for child care expenses allowed under the Internal Revenue Code of the United States. The credit shall not exceed the tax imposed by Section 2355 of this title. The maximum child care credit allowable on the Oklahoma Income tax

return shall be prorated on the ratio that Oklahoma adjusted gross income bears to the federal adjusted gross income.

C. 1. Every taxpayer who operates a manufacturing establishment in the State of Oklahoma shall be allowed a direct credit against income taxes owed by such taxpayer to the State of Oklahoma, the amount of which credit shall be proportioned to the amount of gas used or consumed in Oklahoma by such taxpayer in the operation of a manufacturing establishment, at a rate of three mills per thousand cubic feet of gas used or consumed after May 1, 1971, and during each taxable year of such taxpayer provided that the credit allowed herein shall not apply to the first twenty-five thousand MCF of gas used or gas used to generate electricity or consumed after May 1, 1971, and during each taxable year of such taxpayer.

2. As used in this subsection:

a. "Manufacturing establishment" means a plant or establishment which engages in the business of working raw materials into wares suitable for use or which gives new shapes, new qualities or new combinations to matter which has already gone through some artificial process.

b. "Gas used or consumed" shall include all natural or casinghead gas used in the operation of the manufacturing establishment for whatever purposes, but shall not include the following:

(1) Gas which, after being severed from the earth, is subsequently injected into a formation in the State of Oklahoma for the purpose of storing, recycling, repressuring or pressure maintenance.

(2) Gas vented or flared directly into the atmosphere.

(3) Gas used for fuel in connection with the operation and development for or production of oil or gas in the field where produced.

(4) Gas, any part of which is resold by the manufacturing establishment, except as to that part and quantity of the gas which is actually used by the establishment and not resold.

c. "One thousand cubic feet of gas" (MCF) means that quantity of gas which, measured at a pressure of 15.025 pounds per square inch absolute and at a temperature of 69° Fahrenheit, would have the volume of one thousand cubic feet.

D. 1. There shall be allowed as a credit against the tax imposed by Section 2355 of this title the excise taxes levied by the State of Oklahoma on asphalt, ores bearing lead, zinc, jack, gold, silver, copper, petroleum or other crude oil or other mineral, oil, natural gas and/or casinghead gas or coal where the combined total of such taxes amounts to more than seven and eighty-five one-thousandths percent (7.085%) of the gross value of production of the mineral, oil, gas or coal produced as follows:

a. If, under the terms of a contract between a producer and his purchaser, which has continued in force since December 31, 1976, the excise taxes in excess of seven and eighty-five one-thousandths percent (7.085%) are not reimbursed to a producer and/or royalty owner, then that unreimbursed portion of the excise taxes in excess of seven and eighty-five one-thousandths percent (7.085%) shall be allowed as a direct credit against income taxes owed by the purchaser, producer and/or royalty owner who pays the said unreimbursed portion of excise tax, whether paid on his own behalf or on the behalf of other interest owners to the State of Oklahoma.

b. If the purchaser, producer and/or royalty owner who pays the said unreimbursed portion of excise tax elects to take the tax credit, the credit shall not be limited to the tax liability under Section 2355 of this title. If the tax credit exceeds the liability, the purchaser, producer and/or royalty owner may apply for a refund.

2. Any excise taxes for which the producer and/or royalty owner is actually reimbursed shall not be included as a credit against the tax imposed by Section 2355 of this title, regardless of the contract provisions.

3. No excise taxes paid by a producer and/or royalty owner whether reimbursed or not under the terms of contracts entered into or renegotiated, as to tax-reimbursement provisions, after December 31, 1976, shall be allowed as a credit against the Oklahoma income tax under Section 2355 of this title by the purchaser, producer and/or royalty owner.

E. No aditions to tax shall be made in Oklahoma income tax returns by reason of the recapture or restoration of credits under the Internal Revenue Code, and no other credits against tax shall be allowed in Oklahoma income tax returns except as follows:

1. Those credits provided in this section.

2. Those credits authorized by Section 921 through 925 of Title 82, Oklahoma Statutes and/or Sections 2001 through 2008 of Title 63, Oklahoma Statutes, which have been, or may hereafter be, certified pursuant to applications therefor made on or before March 22, 1971. Provided, the total amount of the credits referred to in this subparagraph 2, to be taken by taxpayer shall not exceed the certified net investment cost of the facilities and/or processes to which such credits pertain, reduced by the greater of:

a. the reduction in federal income tax of taxpayer as the result of deducting depreciation on such

facilities and/or processes, and/or deducting nondepreciable costs for which credit has been so certified; or

b. the increase in the amount of Oklahoma income tax that would result if taxable income were increased by the amount deducted as set forth in subparagraph a., above.

And, provided further, that, after such credits have been exhausted, taxpayer shall each year thereafter adjust taxable income by adding any depreciation taken on such facilities and/or processes, and/or any nondepreciable costs having been included in the net investment cost allowed as credit, and which depreciation and/or costs have been allowed as a deduction in arriving at federal taxable income for such year.

Approved April 19, 1978. Emergency.

Petitioner's Reply Brief

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No. 81-733

In the Supreme Court of the United States

OCTOBER TERM, 1981

CITIES SERVICE GAS COMPANY, a corporation; COLORADO INTERSTATE GAS COMPANY, a corporation; EL PASO NATURAL GAS CO., a corporation; KANSAS-NEBRASKA NATURAL GAS COMPANY, INC., a corporation; MICHIGAN WISCONSIN PIPE LINE COMPANY, a corporation; NATURAL GAS PIPELINE COMPANY OF AMERICA, a corporation; NORTHERN NATURAL GAS COMPANY, a corporation, a division of InterNorth, Inc., a corporation; PANHANDLE EASTERN PIPE LINE COMPANY, a corporation; and TRANSWESTERN PIPELINE COMPANY, a corporation, *Petitioners,*

VERSUS

OKLAHOMA TAX COMMISSION and LEO WINTERS, STATE TREASURER OF OKLAHOMA, *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITIONERS' REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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No.81-733

In the Supreme Court of the United States

OCTOBER TERM, 1981

CITIES SERVICE GAS COMPANY, a corporation; COLORADO INTERSTATE GAS COMPANY, a corporation; EL PASO NATURAL GAS CO., a corporation; KANSAS-NEBRASKA NATURAL GAS COMPANY, INC., a corporation; MICHIGAN WISCONSIN PIPE LINE COMPANY, a corporation; NATURAL GAS PIPELINE COMPANY OF AMERICA, a corporation; NORTHERN NATURAL GAS COMPANY, a corporation, a division of InterNorth, Inc., a corporation; PANHANDLE EASTERN PIPE LINE COMPANY, a corporation; and TRANSWESTERN PIPELINE COMPANY, a corporation, *Petitioners*,

VERSUS

OKLAHOMA TAX COMMISSION and LEO WINTERS, STATE TREASURER OF OKLAHOMA, *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITIONERS' REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

REPLY TO THEIR STATEMENT OF THE CASE

In the limited space available, Petitioners will reply to the arguments first raised in Respondent's Brief in Opposition in the same order as they appear therein.

Respondent correctly explains the statute under "The Parties" at the bottom of page 2. The Petitioners stated the same thing in the last two (2) sentences of paragraph 1

of their Complaint and initially named only the Oklahoma Tax Commission (Respondent herein) as a Defendant. However, when it became necessary to file our Amendment to Complaint in which we sought a Temporary Restraining Order against the State Treasurer, due process required that he be added as a Defendant. Under these circumstances, he was a proper and necessary party.

The previously existing gross production tax discussed in the top paragraph of page 5 applied equally to interstate gas and to intrastate gas, and was so designed and planned. However, the Conservation Excise Tax involved herein was purposely designed and planned to tax mostly interstate gas and to leave intrastate gas, for the most part, untaxed.

In the first full paragraph at about the middle of page 5, Respondent states that: "Contracts between producers and purchasers of gas ordinarily provide for the purchaser to reimburse the producer (and royalty owner) for severance taxes. . . ." The undisputed evidence in the record is that such reimbursement provisions are rare for intrastate gas contracts and almost always for interstate gas.

The third full paragraph on page 6 states that it is not possible to determine how much of the tax in question is paid on intrastate gas and how much is paid on interstate gas because the returns do not require the taxpayers to separately report them. The undisputed figures in the record are contained in Plaintiffs' (Petitioners') Exhibit 5, a projection by Arthur Young & Company, internationally known Certified Public Accountant, based on the best information available. This was undisputed.

At the bottom of page 6 and the top of page 7 and elsewhere, Respondent attempts to inject uncertainty into the ruling of the Oklahoma Supreme Court in the *Post Oak* case by speaking of the amendment to the Tax Credit Act. That does not affect this lawsuit in any way, because it shows on its face that such credit is allowed purchasers only when the producer and/or royalty owners are not reimbursed. As shown on page 2, the undisputed evidence shows that in interstate contracts, the producer or royalty owners are almost always reimbursed.

In a further effort to dilute the adverse effect of the *Post Oak* case, they seek to discredit our judgment in seeking relief in Federal Court, rather than in the state courts. With the Oklahoma Supreme Court having already ruled the acts valid and constitutional in the *Post Oak* case, we had a right to, and did, follow the universal rule that litigants are not required to do a vain, futile and useless act. Further, they state that our belief that the Respondent would file a Demurrer or Motion to Dismiss any action we commenced in state courts is merely an assumption. Well, they did it in this case and it is certainly a safe and reasonable assumption to believe that they would do it in a state court action. Also, it endeavors to escape the adverse effect of the *Post Oak* case by noting that we are purchasers, whereas the Plaintiffs in that case were producers and consumers. This is completely beside the point, because the Oklahoma Supreme Court ruled that the two (2) Acts, taken together, were valid and constitutional. That ruling is just as binding on purchasers as it is on producers or consumers and we are faced with that opinion.

The first full paragraph of page 8 is purely speculative and guesswork and assumptions. In the instant case, the Respondent did not wait until after an evidentiary hearing to file a Motion to Dismiss and Abstain. That was the *very first*, and *only* defensive pleading it filed in the instant case.

The bottom paragraph of page 8 and the top paragraph of page 9 completely ignore the long delay and the extremely heavy burden of taxes to be paid every month by the Petitioners in any state court action, besides always being haunted by the fact that the Oklahoma Supreme Court in *Post Oak* had already declared the acts constitutional.

REPLY TO RESPONDENT'S ARGUMENT FOR DENYING A WRIT OF CERTIORARI

We now reply to Respondent's Argument for Denying a Writ of Certiorari, also in the same order in which they appear in the Brief in Opposition.

At the bottom of page 9 and the top of page 10 they endeavor to escape the devastating (to them) effect of that excellent opinion of this Court, *State of Maryland, et al.* v. *State of Louisiana, et al.*, 49 U.S. Law Week 4562, ... U.S. ....., 101 S.Ct. 2114, 68 L.Ed.2d 576, No. 83 Original, decided by this Court May 26, 1981, the very latest expression by this Court on the issues involved in the instant case, by noting that 28 U.S.C. 1341 did not apply in an original action in this Court as shown in footnote 21. But that is not all that this Court said on this subject. Their Brief completely ignored footnotes 15 and 16 appearing at page 592 of 68 L.Ed.2d, in which this Court said the following:

"15. The pipeline companies removed the case to Federal Court. Louisiana's motion to remand was granted *essentially on the ground that the intervention of the federal district court would be contrary to the provisions of the Tax Injunction Act* 28 U.S.C. 1341 . . ." (emphasis supplied).

and footnote 16 says, in pertinent part,:

". . . by granting Plaintiffs' motions for leave to file, *we rejected Louisiana's motions that the case should be dismissed. . . .*" (emphasis supplied).

As we read that opinion, the reason for rejecting the motions to dismiss was not just because it was an original action in the U. S. Supreme Court. It is speaking of the cases pending in the District Court of Louisiana which were remanded to the state court because of 28 U.S.C. 1341. If we are correct, and we believe we are, that would support our contention that the Tax Injunction Act does not bar us in this case.

That case involved Louisiana's First Use Tax and a parallel statute of First-Use Severance Tax Credit Act, exactly what we had in the two (2) Oklahoma statutes. In holding them unconstitutional, this Court agreed with us on every major issue involved in this case. The following similarities are common to the Oklahoma case and the Louisiana case:

1. Their two (2) statutes and our two (2) statutes violate the Supremacy Clause of the United States Constitution and are unconstitutional under the Commerce Clause (Summary at page 577, headnote 1a-1c, at page 579, headnote 2a-2c at page 579, and headnote 16 at page 581, and pages 599 and 604 of 68 L.Ed.2d).

2. The statutes in question are inconsistent with the Federal scheme and must give way (headnote 2n and pages 598 and 599 of 68 L.Ed.2d).

3. This Court rejected Louisiana's claim that the case should be dismissed under 28 U.S.C. 1341 (see footnotes 15 and 16, supra) as well as on the ground that it was an original action (page 592 of 68 L.Ed.2d).

4. The credit feature tied in with each statute helped make them discriminatory and unconstitutional (headnote 2b and pages 602 and 604 of 68 L.Ed.2d).

5. The two (2) statutes of each state were designed to protect the local consumers and to tax interstate gas (headnote 20 at page 582 and pages 600 and 602 of 68 L.Ed.2d).

6. This Court overruled Louisiana's contention (as the Defendants contended in the instant case) that the Plaintiffs lacked standing to sue because the tax was passed on to the ultimtae consumer (headnote 6 at page 580 and page 598 and footnote 13 at page 589 of 68 L.Ed.2d).

7. Both statutes of each state interfere with FERC's delegated task of regulating (page 597 of 68 L. Ed.2d).

8. This Court held that the Plaintiffs were entitled to judgment on the pleadings (see page 599 of 68 L.Ed.2d).

9. No state tax may be sustained unless it is fairly related to the services provided by the state and if it discriminates against interstate commerce by providing direct commercial advantage to local business (page 600 of 68 L.Ed.2d).

10. For brevity here, please see our quotes from this Court's opinion in that case shown on pages 8-9 of our Petition for a Writ.

11. This Court approved the report of the Special Master in observing that the effect of the limited interest rate of 6% is to permit Louisiana to benefit from any delay attendant to the state court proceedings even if the tax is ultimately found unconstitutional. (Exactly what we have here, except the Oklahoma interest rate is only 3%.) (See page 594 of 68 L.Ed.2d).

It is also to be noted that there was not a single dissent on the merits in this Court's Opinion. Justice Rehnquist did dissent on the question of the jurisdiction of the Supreme Court as an orginal action, but he did not disagree at all with the decision on the merits of the case.

Thus, it would seem that this Court not only ruled that 28 U.S.C. 1341 was inapplicable in original actions, but that it also rejected the State of Louisiana's motions to remand (or dismiss) in the Federal District Court because of 28 U.S.C. 1341.

The so-called state remedies discussed by Respondent at pages 10-12 offer only "paper remedies" and an "empty ritual" as called by some of the courts and are of no help here because of the reasons shown elsewhere in this Reply.

Replying to their comments on the case of *Rosewell* v. *LaSalle National Bank, Trustee*, 49 U.S. Law Week 4285, ... U.S. ....., 101 S.Ct. 1221, 67 L.Ed.2d 464, to save space here, we ask that the Court please read our comments on that case at pages 12-17 in our Petition for a Writ.

Replying to its comments on pages 13-14, we repeat that the so-called "paper remedies" are still on the statute books, but the Oklahoma Supreme Court destroyed their usefulness to us by its decision in the *Post Oak* case. Also,

responsive to their comments that 28 U.S.C. 1341 could apply to every tax case, we point out that here there will be *millions of consumers* adversely affected by the tax and that, although Oklahoma's courts are capable of handling a case involving $113,000,000.00, it has already "handled" this case by its ruling in the *Post Oak* case that the Acts are constitutional and valid.

Turning to its paragraph 4 on page 13, we simply say that whether or not the District Court and the Court of Appeals ruled correctly in the instant case is a matter for this Court to decide and not to be glibly passed over by their comment.

The last two sentences in the top paragraph on page 14 are incorrect because the two (2) Acts involved were publicly proclaimed by the Governor of Oklahoma and the legislative leaders to be for the benefit of Oklahoma consumers at the expense of interstate consumers. Plaintiffs' Exhibits showing press clippings, cassette recordings and video tape recordings of legislative debates all publicly announced and brag that out-of-state people would pay the most of the tax, with Oklahomans paying very little.

Responding to sub-paragraph C on page 14, 15 U.S.C. 717u covers *any* violation of the Natural Gas Act. As this Court has held many times, the latest one being *State of Maryland* v. *State of Louisiana*, supra, any state statute which burdens interstate commerce or interferes with the regulation by FERC is a violation.

Responding to paragraph H on page 16, the Illinois Supreme Court did not hear a federal claim which had already been decided adversely by it. Here the Oklahoma

statutes had already been decided adversely to us by the Oklahoma Supreme Court in *Post Oak*.

The last sentence of sub-paragraph K on page 17, that Oklahoma supplies a "plain, speedy and efficient remedy" in its courts is nothing more than a self-serving declaration by the Respondent.

The last sentence of sub-paragraph L at the bottom of page 17 and the top of page 18, that the Petitioners did not allege that any of them lacked the funds to pay this tax while challenging its validity, is absolutely frivolous and completely irrelevant. They did, as claimed and proved, pay more than $21,000,000.00 through the month in which the case was tried and have been paying it ever since. They should not be penalized just because they were able to pay the tax.

The lack of injunctive relief in Oklahoma, but which was available in the *Rosewell* case and in *Tully* v. *Griffin, Inc.*, is a most important and compelling point to be considered by this Court.

At the bottom of page 19 Respondent asserts that the opinion of the Court of Appeals for the Tenth Circuit "is not in conflict with the decision of any other Court of Appeals on the same matter." But more important, it is in direct conflict with opinions of *this* Court, the latest of which is the *State of Maryland, et al.* v. *State of Louisiana, et al.*, supra.

On page 20 Respondent asserts that under 28 U.S.C. 1341, a litigant should first avail himself of state remedies and not add to the burden of Federal Courts. In this case, as has been asserted many times, state remedies were al-

ready placed out of reach of the Petitioners by the decision in the *Post Oak* case. Furthermore, Federal Courts exist for the very purpose of deciding grave constitutional issues and of violations of Federal statutes and the U. S. Constitution, which have been rejected by state courts.

CONCLUSION

In view of the fact that any state remedies available to the Petitioners had already been foreclosed by the *Post Oak* case and that the Acts violated United States Constitutional provisions and Federal statutes and the guiding light supplied by the *State of Maryland* v. *State of Louisiana* case, this Court should certainly grant the Writ of Certiorari so that it can decide this case on its merits, which has been denied thus far. There is a complete Record of undisputed testimony in support of the position of the Petitioners which is available to help this Court and which has not even been considered by either the trial court or the Court of Appeals. 28 U.S.C. 1341 is not applicable here because the Petitioners do not have a plain, speedy and efficient remedy in the state courts because of the *Post Oak* case.

Respectfully submitted,

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